

vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.210 OF 2012

In the matter of Section 433(e) & (f) and 434 of
the Companies Act, 1956 ;

AND

In the matter of winding up of Premier Brands
Private Limited having its registered office of
the Company at 203, Ekdant Housing Society
Oshiwara, Near Oshiwara Police Station,
Jogeshwari (West), Mumbai – 400 102.

Total Sports & Entertainment India Pvt. Ltd.,	)	
A Company registered under the Companies	)	
Act, 1956 and having its Registered Office	)	
At 601, 6 th Floor, Elecon Arcade, Andheri	)	
Kurla Road, Marol Naka, Andheri (East),	)	
Mumbai – 400 059.	)	...Petitioner

Mr.Aditya Shiralkar with Mr.Hemang Raythatha and Mr.Jayesh
Mestry i/b RMG Law Associates for the Petitioner.

Mr.Raman Gandhi with Mr.A.D. Saman and Mr.Anoop Patil for the
Respondent.

CORAM : **R.D. DHANUKA, J.**
RESERVED ON : **3RD MAY, 2017**
PRONOUNCED ON : **6TH JUNE, 2017**

JUDGMENT :-

1. By this petition filed under sections 433(e) and (f) and 434
of the Companies Act, 1956, the petitioner seeks winding up of the

respondent on the ground that the respondent is unable to pay its debts and also on the ground that it is just and equitable that the company should be wound up. Some of the relevant facts for the purpose of deciding this petition are as under :

2. It is the case of the petitioner that the respondent as well as M/s.Compact Discs India Limited through the common Managing Director Mr.Suresh Kumar Seengal, represented to the petitioner that the respondent had been appointed as Master Licensing and Merchandising Partners and Sole Concessionaires for the Commonwealth Games Delhi 2010 by the Organizing Committee. Based on such representation, the petitioner entered into an agreement i.e. Deal Memo dated 21st May, 2010 with the respondent on the terms and conditions set out in the said agreement. Under the said agreement, the respondent appointed the petitioner as its representative to negotiate on its behalf with the potential licensing and merchandising partners in India in relation to the Commonwealth Games Delhi 2010. Clauses 2.1, 2.2 and 2.3 of the said agreement are extracted as under :-

“2.1 If PBPL enters into an agreement with a Partner/s following an introduction effected by TSEIPL during the Representation Period, executed either directly or until the Common Wealth Games 2010, PBPL will pay to TSEIPL a commission of 20% of the gross revenues due from each Parter to PBPL under each agreement executed between PBPL and the Partners (“L&M Agreement”) for the entire duration of the L&M Agreement or any extension and renewal thereof (Commission).

2.2 All deals will be signed directly between PBPL and the potential licensee.

2.3 In all cases, PBPL shall invoice the Partners directly and collect the payment due from the Partners, PBNPL shall immediately then remit the commission due to TSEIPL. TSEIPL shall bear its own corporate taxes on the commission received from PBPL.”

3. It is the case of the petitioner that vide letter dated 26th May, 2010, the Organizing Committee, Commonwealth Games (for short the said OC, CWG) also confirmed the appointment of the respondent for the merchandising programme for Commonwealth Games 2010 through its email sent by the Managing Director dated 26th May, 2010.

4. It is the case of the petitioner that pursuant to the said agreement entered into between the parties, the petitioner introduced nine clients / partners to the respondent. Out of those nine clients, the respondent executed the agreements with eight clients for various amounts totalling to Rs.14,47,50,000/-. It is the case of the petitioner that the petitioner became entitled to receive from the respondent commission at the rate of 20% of the said amount of Rs.14,47,50,000/- i.e. a sum of Rs.2,89,50,000/-. It is also the case of the petitioner that the respondent did not enter into an agreement with Nestle Limited introduced by the petitioner where the amount of contract was to be at Rs.35,00,000/-. It is the case of the petitioner that since the respondent did not execute the said agreement with the said Nestle Limited for which the respondent was solely responsible,

the petitioner became entitled to the commission of Rs.7,00,000/- in respect of the said transaction also. According to the petitioner, the petitioner is entitled to the said commission of Rs,2,96,50,000/- under the said agreement.

5. Some time in the month of September, 2010, the respondent issued and tendered to the petitioner a cheque dated 27th September, 2010 drawn on State Bank of Patiala for Rs.19,99,600/- only towards part payment of the amount of commission to the petitioner. The said cheque was however, dishonoured upon presentation and was returned with the remarks "exceeds arrangements". The said cheque was once again dishonoured upon presentation with the remarks "payment stopped by the drawer", inspite of the assurance made by the respondent to honour the said cheque.

6. The petitioner issued a legal notice of demand dated 29th December, 2010, upon the respondent by registered A.D., U.P.C. as well as by email calling upon the respondent to pay to the petitioner an amount of Rs.2,96,50,000/- along with interest thereon at the rate of 18% p.a. The said notice was duly served upon the respondent by U.P.C. and email and registered post. The said statutory notice was issued under sections 433 and 434 of the Companies Act, 1956.

7. On 31st January, 2011, the petitioner received a reply from the respondent to the said statutory notice. Though the respondent admitted the execution of the agreement between the petitioner and the respondent, it denied various other allegations made by the petitioner and also denied the demand made by the petitioner. Insofar

as the cheque amount of Rs.19,99,600/- which was issued by the respondent to the petitioner is concerned, it was alleged in the said reply that the said cheque was issued by the respondent in the form of guarantee and in anticipation, finalization or formalization of the contracts with the sub-licencees / partners. The respondent denied that any of the partners or sub-licencees made payment as alleged by the petitioner in the statutory notice.

8. On 17th February, 2012, the petitioner filed this petition *inter-alia* praying for winding up of the respondent. It is the case of the petitioner that the respondent was duly served with the copy of the petition and the notice at the registered office address of the respondent, which was returned with the remarks “left” though the same address was shown all throughout in the records of the Registrar of Companies and also in various pleadings filed by the respondent itself. By an order dated 17th January, 2013, passed by this Court, this company petition came to be admitted.

9. The company petition was thereafter advertised pursuant to the said order dated 17th January, 2013. The petitioner filed affidavits of publication. The notice under Rule 28 of the Companies (Code) Rules, 1959 which was sought to be served by the petitioner on the respondent was returned with remark “left”. The matter appeared for hearing and final disposal before this Court on 14th November, 2014. None appeared for the respondent, though served. By an order dated 14th November, 2014 passed by this Court, the aforesaid company petition was allowed in terms of prayer clauses (a) and (b) and the respondent was ordered to be wound up under the directions of this Court and under the provisions of the

Companies Act, 1956. By the said order, the Official Liquidator of this Court came to be appointed as a Liquidator of the respondent with all powers under section 457 of the Companies Act, 1956, including the powers and authority to take charge and possession of the property and assets of the respondent and to deal with and dispose off in accordance with law.

10. The respondent thereafter filed two Company Applications bearing Nos.661 of 2015 and 693 of 2015 in the aforesaid company petition. The Company Application No.693 of 2015 was filed *inter-alia* praying for leave under clause 446(1) of the Companies Act, 1956 to implead the Official Liquidator as a party to the suit filed by the respondent before Delhi High Court. Insofar as the Company Application No.661 of 2015 is concerned, the same was filed for recall and setting aside of the order dated 17th January, 2013 passed by this Court thereby admitting the company petition and the order dated 14th November, 2014 passed by this Court allowing the company petition and ordering winding up of the respondent.

11. By an order dated 24th November, 2016, this Court observed that the notice issued to the company at its registered address must be deemed to be delivered even if it is returned unclaimed. This Court adverted to the judgment of the Supreme Court in case of **K.Bhaskaran vs. Sankaran Vidhyan Balan, (1999) Supp.(3) SCR 271** and held that just as notice at the correct address of the addressee refused by the addressee is presumed to be served on him, a notice returned as unclaimed also similarly raises a presumption under section 27 of the General Clauses Act that the notice is duly served on the addressee.

12. This Court however, considered the peculiar facts of the present case that there was already a pending suit, which is being contested between the parties, there was an arbitration reference pending between the respondent company and Commonwealth Games Committee, involving a large claim and held that though there is presumption of law concerning deemed notice, interest of justice requires that the final winding up order passed in the petition is recalled and set aside in the peculiar facts and circumstances of the case and the petition accordingly came to be restored to file at the stage of hearing and final disposal. This Court directed that the Official Liquidator who was already appointed in the matter and who was incharge at the liquidation proceedings, shall continue to operate for the time being as the Provisional Liquidator.

13. It was clarified that the arbitration reference pending before Shri Justice D.P. Wadhwa, a retired Judge of the Supreme Court between the respondent herein and the Commonwealth Games Committee shall be prosecuted by the directors of the respondent in presence of the Official Liquidator as Provisional Liquidator and his presence came to be dispensed with.

14. The respondent thereafter filed affidavit in reply in this company petition dated 16th December, 2016. The petitioner filed a rejoinder dated 11th February, 2017.

15. During the pendency of this winding up petition, the petitioner herein filed a suit (1091 of 2013) before the Delhi High Court against the respondent *inter-alia* praying for an amount of

Rs.2,97,78,800/- from the respondent to the petitioner under the said Deal Memo. On 16th September, 2016, the respondent filed a writ petition under section 482 of the Criminal Procedure Code against the petitioner before the Punjab & Haryana High Court in the proceedings filed under section 138 of the Negotiable Instruments Act by the petitioner for dishonour of part payment of Rs.19,99,600/-. In the said writ petition, there was a reference made by the respondent to the pendency of this company petition.

16. Some time in the year 2014, the respondent filed a Civil Suit bearing No.159 of 2014 against the petitioner before the Delhi High Court *inter-alia* praying for a declaration that the Deal Memo dated 21st May,2010 was frustrated and unsuccessful. It is the case of the petitioner that the address of the respondent mentioned in the said suit was the same as its registered office address at which the petitioner had sent the papers and proceedings and the notices of the winding up petition which were returned with the remarks "left or unclaimed". In the said suit filed by the respondent, the petitioner herein filed an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908. The said application filed by the petitioner is rejected. The Delhi High Court has closed the right of the petitioner to file a written statement in the said suit. The petitioner has filed an application for recall of the said order passed by the Delhi High Court. The suit filed by the petitioner and the suit filed by the respondent are pending before the Delhi High Court.

17. Mr.Shiralkar, learned counsel appearing for the petitioner invited my attention to the Deal Memo dated 21st May, 2010 and submits that under the said agreement entered into between the

parties, the petitioner had introduced nine clients i.e. partners / sub-licencees to the respondent. The respondent executed the agreements with the eight clients introduced by the petitioner for an aggregate amount of Rs.14,47,50,000/-. He submits that the respondent deliberately did not execute an agreement with Nestle Limited which contract was to be for Rs.35,00,000/-. The petitioner is entitled to 20% commission on that amount also.

18. It is submitted by the learned counsel for the petitioner that under clause 2.3 of the said Deal Memo, the respondent had agreed to enter into an agreement with the partners introduced by the petitioner directly. It was agreed by the parties that in all cases, the respondent shall invoice the partners directly and collect the payment due from the partners. The respondent further agreed that the respondent shall immediately then remit the commission due to the petitioner. It was agreed that all the deals will be signed directly between the respondent and the potential licencees. Under clause 2.1, the respondent agreed to pay to the petitioner the commission of 20% of the gross revenue due from each partner to the petitioner under each agreement executed between the respondent and the partners for the entire duration of the agreement or any extension or renewal thereof.

19. It is submitted by the learned counsel that the role of the petitioner was to introduce a party. He submits that the petitioner was only required to bring the partners / sub-licencees and once an agreement was executed between the respondent and such partners / sub-licencees, the petitioner became entitled to receive 20% of the consideration amount as its commission. The petitioner

was not required to do anything else. He submits that the claim for commission of the petitioner was not dependent upon the successful execution and or performance of the contract by the respondent with those partners / sub-licencees or with the said O.C., C.W.G. The petitioner having introduced such clients and the respondent having executed the agreements with such partners / sub-licencees, the petitioner became entitled to be paid such commission at the rate of 20% of the amount mentioned in the agreements entered into between the respondent and such partners / sub-licencees.

20. Learned counsel for the petitioner invited my attention to the averments made in paragraph 8 of the affidavit in reply filed by the respondent setting out the names of seven clients introduced by the petitioner with whom the respondent has admittedly executed the agreements for various amounts. He submits that it is the case of the respondent itself that the respondent had received a sum of Rs.4,75,32,060/- from those partners / sub-licencees introduced by the petitioner. He submits that the respondent has not paid even 20% of the said amount which is admittedly received by the respondent from those clients / sub-licencees introduced by the petitioner.

21. Learned counsel for the petitioner invited my attention to the reply dated 31st January, 2011 sent by the respondent to the statutory notice issued by the petitioner. He submits that though the respondent admitted execution of the agreement between the petitioner and the respondent, however falsely alleged that the payment of commission to the petitioner was contingent upon the award of licence by Commonwealth Games and consequently formal contracts being finalized between the respondent and the other sub-

licencees. It was alleged in the said reply that the sub-licencees mentioned by the petitioner had either not made such payments or payments made by few others were not for complete amount as stipulated in contract. It was further alleged that the sub-licencee, who had made partial payment were raising disputes and were asking for refund of amounts paid by them. He submits that the defence raised in reply to the statutory notice that the cheque for the amount of Rs.19,99,600/- issued by the respondent to the petitioner was in the form of guarantee is frivolous. Learned counsel invited my attention to the order passed by the Punjab & Haryana High Court recording the statement made by the respondent that there was no dispute in respect of the payment of the said sum of Rs.19,99,600/- to the petitioner under the said Deal Memo.

22. Learned counsel for the petitioner invited my attention to some of the defences raised in the affidavit in reply and would submit that such defences are extraneous to the claim of the petitioner and are totally frivolous and moonshine. He submits that the petitioner is not concerned with the case of the respondent that the said O.C., C.W.G. had filed an arbitration proceedings against the respondent or that the respondent has filed a counter claim in the said arbitration proceedings against the said O.C., C.W.G. He submits that merely because the petitioner as well as the respondent has filed two separate suits before the Delhi High Court, filing of such suits would not be a bar against the petitioner from prosecuting this company petition filed *inter-alia* praying for winding up of the respondent.

23. It is submitted by the learned counsel for the petitioner that the civil suit filed by the respondent before the Delhi High Court is

totally frivolous and is filed as the counter-blast to the suit and the company petition filed by the petitioner against the respondent. He submits that the respondent never terminated the Deal Memo dated 21st May, 2010 and on the contrary has acted upon the said Deal Memo and accepted the moneys to the tune of Rs.5,27,00,000/- from various partners / sub-licencees introduced by the petitioner under the said Deal Memo.

24. Learned counsel for the petitioner invited my attention to the balance sheet of the respondent for the financial year 2013-2014 showing negligible bank balance in the account of the respondent. He submits that the respondent has siphoned off huge amount recovered from the partners / sub-licencees introduced by the petitioner and did not pay any amount except Rs.19,99,600/- to the petitioner. It is submitted that the enquiry made by the Official Liquidator pursuant to an order of appointment made by this Court also clearly shows that the respondent does not have its registered office on ownership basis now but there is a leave and licence agreement by the owner in some one else's name in respect of the registered office premises claimed by the respondent.

25. Learned counsel invited my attention to the balance sheet of the respondent as at 31st March, 2014 showing extremely poor financial position and nil revenue between 2013-2014. The only transaction entered into by the respondent appears to be between 2009 and 2014. The balance sheet of the respondent also indicates that the respondent had accepted and received the moneys to the tune of Rs.5,27,00,000/- from various licencees introduced by the petitioner under the Deal Memo. He submits that the learned

arbitrator has suspended the counter claim of the respondent on 16th March, 2015 on the ground of non-payment of the arbitrator's fees. It is submitted that the respondent is thus unable to pay its debts and thus deserves to be wound up on that ground and also on the ground of just and equitable.

26. Mr.Gandhi, learned counsel for the respondent on the other hand submits that under clause 2.3 of the Deal Memo, unless the respondent would have received the claim and cleared the amounts from the partners / sub-licencees introduced by the petitioner, the respondent was not liable to pay any commission to the petitioner. He invited my attention to some of the notices issued by some of the partners / sub-licencees introduced by the petitioner and would submit that such partners / sub-licencees introduced by the petitioner have called upon the respondent to return the amount paid by them to the respondent. He submits that the petitioner thus cannot make any demand in respect of the amount paid, if any, by such partners / sub-licencees introduced by the petitioner from the respondent.

27. It is submitted by the learned counsel for the respondent that if the respondent subsequently found that the said O.C., C.W.G. did not have any authority to award any rights in favour of the respondent. He submits that another entity incorporated in Singapore has claimed rights vide an agreement dated 25th July, 2007. He submits that the said O.C., C.W.G. had committed fraud upon the respondent. He submits that the said O.C., C.W.G. has also filed the arbitration proceedings against the respondent which are pending before the learned arbitrator, a former Judge of the Supreme Court.

He submits that the respondent has made a substantial counter claim of about 75,00,00,000/- against the said O.C., C.W.G.

28. Learned counsel for the respondent submits that at the instance of the said O.C., C.W.G., the entire matter is also referred to the C.B.I., who has also filed an F.I.R. against the respondent and several others. He submits that the petitioner also has filed a civil suit against the respondent in addition to this winding up petition and also the proceedings under section 138 of the Negotiable Instruments Act.

29. Learned counsel for the respondent submits that in view of pendency of several proceedings in respect of the same transaction pending before different Courts, including criminal proceedings, the petitioner cannot pursue this winding up petition against the respondent. He submits that if the petitioner obtains no objection from those partners / sub-licencees, that they would not make any claim against the respondent arising out of those agreements which are entered into between the respondent and those partners / sub-licencees, the respondent can make some payment to the petitioner.

30. It is submitted by the learned counsel for the respondent that the respondent also has filed a separate suit against the petitioner inter-alia praying for a declaration that the said Deal Memo is void and is not binding upon the respondent. The respondent has also prayed for recovery of the amount paid by the respondent to the petitioner. He submits that the right of filing of the written statement in the suit filed by the respondent before the Delhi High Court is already closed. He submits that the agreement with those partners / sub-licencees introduced by the petitioner are not fructified and thus no

order of winding up can be passed by this Court in this petition.

31. It is submitted by the learned counsel for the respondent that the petitioner has suppressed the fact of filing a suit before this Court while obtaining an order of admission of the company petition and also an order of winding up against the respondent. He submits that if the petitioner would have disclosed the factum of filing a civil suit for recovery of the amount under the said Deal Memo, this Court would not have passed an order of admission of the petition or of winding up of the respondent. He submits that since the petitioner did not approach this Court with clean hands and have committed fraud upon the respondent, the petitioner cannot be granted any discretionary relief by this Court. In support of this submission, learned counsel for the respondent placed reliance on the judgment of the Supreme Court in case of **Manohar Lal vs. Ugrasen & Ors. (2010) 11 SCC 557** and in particular paragraphs 48 to 52, the judgment of the Supreme Court in case of **S.P. Chengal Varaya Naidu vs. Jagannath & Ors. (1994) 1 SCC 1** and in case of **State of U.P. & Ors. vs. Ravindra Kumar Sharma & Ors. AIR 2016 SC 690.**

32. Learned counsel for the respondent states that since the license which was to be granted by the O.C., C.W.G. did not fructify, the respondent suffered very heavy loss. The counter claim made by the respondent against the said O.C., C.W.G. is pending before the learned arbitrator. He submits that in this situation, the contract entered into between the petitioner and the respondent has been frustrated and cannot be enforced. He submits that the company petition thus cannot be entertained in view of the frustration of

contract under section 56 of the Indian Contract Act, 1872. In support of this submission, he placed reliance on the judgment of the Supreme Court in case of **Har Prasad Choubey vs. Union of India & Anr. (1973) 2 SCC 746** and in particular paragraph 9, in case of **Smt.Sushila Devi & Anr. vs. Hari Singh & Ors. AIR 1971 SC 1756** and in particular paragraphs 5, 7, 11 and 12, and in case of **Rozan Mian vs. Tahera Begum & Ors. AIR 2007 SC 2883** and in particular paragraphs 9 to 11.

33. It is submitted by the learned counsel for the respondent that no contract between the Organizing Committee, Commonwealth Games and the respondent came to be signed. Only a draft of the agreement was exchanged.

34. Learned counsel for the respondent placed reliance on the judgment of the Supreme Court in case of **IBA Health (India) Pvt. Ltd. vs. Info-Drive Systems SDN. BHD., (2010) 10 SCC 553** and in particular paragraphs 9, 11, 18, 20 to 24, 29 to 31 and would submit that since there is substantial dispute between the parties in respect of the alleged entitlement of the petitioner of the commission, this company petition *inter-alia* praying for winding up cannot be entertained. He submits that the suit of the respondent having been filed first in point of time, both the suits are already tagged and are pending before the Delhi High Court. The next date of hearing in those suits is 4th July, 2017.

35. Mr.Shiralkar, learned counsel appearing for the petitioner in rejoinder submits that the Deal Memo entered into between the parties is not frustrated but is acted upon. The respondent has

already made part payment to the petitioner. He submits that the petitioner is not concerned with whether the respondent received the entire amount from the partners / sub-licencees introduced by the petitioner or not. The petitioner was entitled to be paid the commission upon the respondent having executed the agreements with those partners / sub-licencees and the said commission was not dependent upon the actual receipt of such amounts were actually recovered by the respondent from those partners / sub-licencees or not or whether the contract entered into by and between the respondent and the partners / sub-licencees or that the said O.C., C.W.G. were frustrated or successfully performed or not. The liability of the respondent to pay to the petitioner was on the basis of the amount due under the said agreements entered into between the respondent and the partners / sub-licencees introduced by the petitioner.

36. It is submitted that in clause 2.3 of the Deal Memo, the parties had provided the mode and manner of the payment which was not based on the entitlement of the respondent to recover the same from those parties or on the basis whether the respondent earned any profit or recovered any amount from those parties or from the said O.C., C.W.G. or not. The liability of the respondent had already triggered upon the execution of the agreements between the respondent and those partners / sub-licencees introduced by the petitioner.

37. It is submitted by the learned counsel for the petitioner that that even if the said O.C., C.W.G. has terminated the contract awarded, if any, to the respondent or even if those partners / sub-

licencees have called upon the respondent to return the amounts paid by them, the same would not have any bearing on the obligation of the respondent to pay the commission charges to the petitioner under the said Deal Memo. He submits that even if the contracts entered into between the respondent and those partners / sub-licencees or between the respondent and the O.C., C.W.G. are frustrated, the respondent itself was responsible for such frustration and thus cannot refuse to comply with its obligation to pay the commission charges to the petitioner on that ground. He submits that section 56 of the Indian Contract Act, 1872 thus would not be attracted to the facts of this case.

38. Insofar as the submission of the learned counsel for the respondent that the contract between the parties hereto is frustrated on the ground that the partners / sub-licencees introduced by the petitioner are demanding refund of the amount paid by them, from the respondent is concerned, it is submitted that the petitioner is not concerned with any such legal notices alleged to have been sent by those parties. He submits that in any event the respondent has not produced any proceedings, if any, filed by those parties against the respondent for seeking refund of the said amounts. He submits that the claims, if any, of those parties, are already barred by limitation. He submits that the respondent has also not produced any reply to those notices sent by the respondent and are suppressed by the respondent. He submits that it is not the case of the respondent that such amounts demanded by those partners / sub-licencees from the respondent are kept in escrow.

39. Learned counsel for the petitioner distinguished the

judgments cited by the respondent on the ground that none of those judgments would assist the case of the respondent on the ground that the facts in those matters were totally different than the facts of this case.

40. Learned counsel for the petitioner invited my attention to the balance sheet of the respondent for the year ending 31st March, 2014, which would indicate that the respondent had received various advances from those partners / sub-licencees introduced by the petitioner. He submits that the bank balance as at 31st March, 2014 of the respondent is shown at Rs.6,900/- and the cash amount is shown at Rs.1,12,070/-. The respondent has been suffering losses. Balance sheet does not show any reserve and surplus. The value of the fixed assets shows very negligible amounts. He submits that it is thus clear that though the respondent had recovered more than Rs.5,00,00,000/- from various licencees being siphoned of the said amount.

41. It is submitted by the learned counsel that the respondent itself had filed affidavits before the Punjab & Haryana High Court on 25th March, 2013 and 16th September, 2013 and was fully aware of this winding up petition but did not appear in these proceedings deliberately. The respondent had suppressed about those proceedings and affidavits filed by the respondent before this Court in the company application filed by the respondent for recall of the order passed by this Court. He also invited my attention to the papers and proceedings in Criminal Miscellaneous Application No.13870 of 2014 filed by the respondent in which the respondent itself has made an averment that the respondent was proposing to file a suit against the

petitioner. He submits that the petitioner did not suppress any facts as alleged by the respondent.

42. It is submitted that the suit filed by the petitioner was after filing of the company petition and thus could not have been mentioned in the company petition. He submits that the petitioner is entitled to prosecute the company petition as well as the suit and both are maintainable. He submits that even if the petitioner would have disclosed about the pendency of the suit when the company petition was initially admitted and was allowed subsequently, filing of the suit by the petitioner would have no bearing on the said order. He submits that even today the registered office of the respondent is at the same address at which the petitioner had sent the papers and proceedings and the said address continued on the records of the Registrar of Companies. Even in the plaint filed by the respondent against the petitioner, the respondent has shown the same registered office address. Learned counsel tenders a copy of the record of Registrar of Companies issued in the month of February, 2017 showing the same registered office address of the respondent.

43. Learned counsel for the respondent submits that since this Court has already set aside the *ex-parte* order, this Court cannot now re-open that issue. He submits that one of the partner introduced by the petitioner has filed a suit against the respondent *inter-alia* for recovery of Rs.1,50,00,000/-.

REASONS AND CONCLUSIONS :

44. There is no dispute that the parties had executed Deal

Memo dated 21st May, 2010, by which the respondent had appointed the petitioner as its representative on non-exclusive basis to negotiate on behalf of the respondent with potential licensing and merchandising partners in India in relation to the Commonwealth Games Delhi 2010 on the terms and conditions recorded in the said agreement. It is the case of the respondent that the said O.C., C.W.G. had granted licensing and retail rights in favour of the respondent vide letters of acceptance dated 19th May, 2010, 28th May, 2010 and 29th June, 2010. According to the respondent, the said O.C., C.W.G. however, did not have any authority to award such sites in favour of the respondent and such rights were already having been awarded in favour of another entity incorporated in Singapore, M/s.Sports Marketing and Management as far back as on 25th July, 2007. The said O.C., C.W.G. had no right to grant a license in favour of the respondent. It is not in dispute that the respondent did not terminate the said Deal Memo executed with the petitioner at any stage till today.

45. A perusal of the affidavit in reply filed by the respondent clearly indicates that even according to the respondent, pursuant to the said Deal Memo executed between the petitioner and the respondent, the respondent has executed the agreements at least with seven partners / sub-licencees who were introduced by the petitioner having the contract value aggregating to Rs.14,47,50,000/- and the respondent had received a sum of Rs.4,75,32,060/- from those seven partners / sub-licencees though the respondent has denied having received a sum of Rs.14,47,50,000/- from the partners / sub-licencees introduced by the petitioner, the respondent has admitted the receipt of Rs.4,75,32,060/- from those seven

partners / sub-licencees introduced by the petitioner.

46. It is not in dispute that the respondent has already paid a sum of Rs.19,99,600/- to the petitioner under the said Deal Memo executed by and between the parties. The respondent has now given up the plea that the said amount was not paid by the respondent to the petitioner under the said Deal Memo. The respondent has refused to pay the balance amount on the ground that the agreements entered into between those partners / sub-licencees introduced by the petitioner with the respondent and between the respondent and the said O.C., C.W.G. did not fructify and as a result thereof the transaction between the petitioner and the respondent were frustrated within the meaning of section 56 of the Indian Contract Act, 1872. The respondent has refused to pay the balance amount to the petitioner also on the ground that the respondent had not received the entire amount from those seven partners / sub-licencees introduced by the petitioner and on the ground that those parties had asked for refund of the amounts paid by them to the respondent. One of those parties has also filed a suit for recovery of the said amount from the respondent.

47. A perusal of the Deal Memo entered into between the petitioner and the respondent clearly indicates that the respondent had represented and had given the guarantee in the said Deal Memo that they had exclusive rights to be the sole concessionaire including brand licensing and merchandising rights holder of the Commonwealth Games 2010 and all rights and benefits were granted by the licensor to the licensee i.e. the petitioner herein. Clause 1.2 of the said agreement provides that the said agreement shall be in force

upon execution by both the parties and unless terminated in accordance with the provisions of the said Deal Memo for one year.

48. Clause 2.1 of the said agreement provides that the respondent will enter into agreement with a partner/s following an introduction effected by the petitioner during the Representation Period, executed either directly or until the Common Wealth Games 2010 was over and will pay to the petitioner commission @ 20% of the gross revenue due from each partner to the respondent under each agreement executed between the respondent and the Partners for the entire duration of the L & M Agreement or any extension and renewal thereof. Clause 2.2 provides that all deals will be signed directly by the respondent and and the potential licensee. Clause 2.3 provides that in all cases, the respondent shall invoice the Partners directly and collect the payment due from the Partners and the respondent shall immediately then remit the commission due to petitioner.

49. A conjoint reading of clauses 2.1 to 2.3 makes it clear that the respondent was entitled to sign all the deals directly with the potential partners / sub-licensees introduced by the petitioner and to collect the payment due from those partners / sub-licensees. The respondent had also agreed to pay the commission @ 20% of the gross revenues due from each partner to the respondent under each agreement executed by the respondent and partners. It is clear that the said commission @ 20% payable to the petitioner by the respondent was of the gross revenues due to the respondent from each partner introduced by the petitioner and was not dependent upon the full amount to be received by the respondent.

50. In my view, the entitlement of the petitioner of the commission was under clause 2.1 of the said agreement, whereas the mode and manner of payment was agreed under clauses 2.2 and 2.3 of the said agreement. The respondent has admittedly executed at least seven such L & M agreements with the partners / sub-licencees introduced by the petitioner which agreements showed various amounts due and payable to the respondent by those partners / sub-licencees. It is not the case of the respondent that the amounts mentioned in those agreements were not due to the respondent from those partners / sub-licencees introduced by the petitioner. It is also not in dispute that the respondent had recovered substantial amount from those partners / sub-licencees under those seven agreements. The liability of the respondent to pay the commission @ 20% of the gross revenues from each partner to the respondent was thus crystallized under clause 2.1 when the petitioner had introduced those parties to the respondent and the agreements were executed between the respondent and those partners / sub-licencees introduced by the petitioner.

51. In my view, merely because the respondent did not recover or could not recover the balance amount, if any, from those partners / sub-licencees under those agreements for whatsoever reasons alleged in the affidavit in reply or merely because there was a dispute between the respondent and the said O.C., C.W.G. or on the ground that the respondent also had made a counter claim against the said O.C., C.W.G. before the learned arbitrator, the obligation of the respondent to pay the commission @ 20% on the gross revenues due from each partner to the respondent would not

frustrate under the said Deal Memo entered into between the petitioner and the respondent.

52. In my view, the petitioner is not concerned with the outcome of the arbitration proceedings filed by the said O.C., C.W.G. or any counter claim filed by the respondent against the said O.C., C.W.G. before the learned arbitrator. In my view, even if the partners / sub-licencees introduced by the petitioner do not pay the balance amount to the respondent, the said event also will not frustrate the obligation of the respondent to pay the commission @ 20% on the gross revenues dues from each partner / sub-licencee to the respondent and such commission is being payable to the petitioner. The petitioner has already complied with its part of obligation under the said Deal Memo by introducing the partners / sub-licencees and became entitled to claim the commission @ 20% of gross revenues due from each partner to the respondent under those agreements. In my view reliance placed on section 56 of the Indian Contract Act, 1872 by the respondent to dispute the claim of the petitioner is totally misplaced and is not attracted to the facts of this case.

53. It is matter of record that the respondent had already paid a sum of Rs.19,99,600/- to the petitioner under the said Deal Memo and refused to pay the balance amount. It is thus clear that the parties have acted upon the said Deal Memo and thus there is no question of any frustration of the said Deal Memo as canvassed by the learned counsel for the respondent.

54. In my view the judgment of the Supreme Court in case of

Smt.Sushila Devi & Anr. (supra) and in case of **Har Prasad Choubey** (supra) would not assist the case of the respondent. The Supreme Court in case of **Smt.Sushila Devi & Anr.** (supra) had considered a situation of partition of India on 15th August, 1947 and as a result thereof, one of the Tehsil became part of Pakistan. After considering the evidence led in that case to establish that even before the actual partition of India took place, because of the serious communal troubles, it was not possible for the respondents to go to that Tehsil either to cultivate the lands or even to collect the rent from those who were cultivating the lands, the Supreme Court held that it was impossible for the plaintiff to even get into Pakistan in view of the prevailing circumstances, to either take possession of the properties intended to be leased or even to collect rent from the cultivators and for that situation the plaintiffs were not responsible in any manner whatsoever. It is held by the Supreme Court that section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. In my view, the said judgment of the Supreme Court is clearly distinguishable in the facts and circumstances of this case.

55. In this case, the obligation of the respondent to pay a commission to the petitioner was crystallized on the petitioner introducing those partners / sub-licencees to the respondent and on the respondent having executed the agreements with them. The amount of 20% of commission was payable on the basis of the amount due to the respondent by those partners / sub-licencees introduced by the petitioner. A perusal of the record indicates that the respondent has already recovered substantial amount from those parties introduced by the petitioner but did not pay any amount to the

petitioner towards commission. The respondent is thus benefited out of those agreements entered into between those partners / sub-licencees and the respondent. In my view, if a party who is himself responsible for frustration of the contract, if any, he cannot take benefit out of such default on his part and cannot refuse to perform his part of obligation under the agreement on the ground of alleged frustration of the contract under section 56 of the Indian Contract Act, 1872.

56. Insofar as the judgment of the Supreme Court in case of **Har Prasad Choubey** (supra) relied upon by the learned counsel for the respondent is concerned, the said judgment of the Supreme Court would assist the case of the petitioner and not the respondent.

57. Merely because the other parties have filed some proceedings against the respondent or the respondent having filed the counter claim against those parties, cannot exempt the respondent from complying with its obligation to pay the commission to the petitioner. This Court cannot go into the merits of those proceedings filed by the O.C., C.W.G. against the respondent or visa versa or decide the validity of the demand notices issued by some of the partners / sub-licencees demanding refund of the amount paid by them to the respondent in this petition.

58. In my view, the out come of those pending proceedings or the demands as the case may be against the respondent would not have any bearing on the obligation of the respondent to pay commission charges to the petitioner since the said obligation to pay the commission charges was crystallized upon the petitioner

introducing those partners / sub-licencees and upon the respondent executing the agreement with them. In my view, this defence of the respondent is totally frivolous and is moonshine.

59. Insofar as the submission of the learned counsel for the respondent that the suits filed by the petitioner against the respondent for recovery of amount and the suit filed by the respondent against the petitioner for a declaration that the said Deal Memo was pending and thus this company petition cannot be entertained is concerned, in my view, there is no bar against the petitioner from filing winding up petition against the respondent on the grounds permissible under section 434 of the Companies Act, 1956 even if civil suit for recovery of money is filed. The winding up petition is not for recovery for any amount. In the civil suit filed by the petitioner, the petitioner has prayed for a decree for recovery of the commission amount with interest payable by the respondent to the petitioner. Both the proceedings can be simultaneously proceeded with.

60. Insofar as the submission of the learned counsel for the respondent that the petitioner has lost its right to file a written statement in the said suit filed by the respondent for a declaration and for refund of the amount paid by the respondent to the petitioner is concerned, it is not in dispute that the application for recall of the said order passed by the Delhi High Court closing the right of the petitioner to file a written statement is pending. Be that as it may, this petition for winding up cannot be dismissed on the ground that the petitioner has alleged to have lost its right to file a written statement in the said suit filed by the respondent. The Delhi High Court has

clubbed both the suits filed by the parties *inter-se* against each other for hearing and final disposal. There is no merit in this submission made by the learned counsel for the respondent. This Court cannot decide the merits of the said application for recalling of the order passed by the Delhi High Court.

61. In my view, there is no merit in the submission made by the respondent that the petitioner had suppressed any facts from this Court and more particularly about filing of the civil suit filed by the petitioner against the respondent when the aforesaid company petition was heard at the stage of admission and also at the stage of final hearing. When the company petition was filed by the petitioner, the said civil suit for recovery of money was not even filed by the petitioner and thus there was no question of the petitioner disclosing about the said suit against the respondent. In my view even if the petitioner did not inform this Court at the time of admission or at the time of final hearing that the petitioner had already filed a suit for recovery of the amount, the said information would not have any bearing upon the merits of this company petition. The petitioner is entitled to pursue a civil suit for recovery of money as well as winding up petition. Both the proceedings are for different reliefs and are maintainable at the same time.

62. On the contrary, a perusal of the record indicates that the respondent had suppressed the facts before this Court that the respondent was fully aware of the pendency of this petition for winding up when the respondent applied for setting aside *ex-parte* orders passed by this Court. A perusal of the pleadings filed by the respondent before the Punjab & Haryana High Court clearly indicates

that the respondent was fully aware of the pendency of this company petition at that time.

63. Insofar as the judgment of the Supreme Court in case of **Manohar Lal** (supra), in case of **S.P. Chengal Varaya Naidu** (supra), in case of **Ram Chandra Singh** (supra) and in case of **State of U.P. & Ors.** (supra) relied upon by the learned counsel for the respondent in support of the submission that the petitioner had alleged to have suppressed about filing of the civil suit for recovery of money against the respondent and thus no relief of any nature whatsoever shall be granted by this Court in favour of the petitioner is concerned, there is no dispute about the proposition of law laid down by the Supreme Court in the aforesaid judgments holding that a party who approaches the Court has not only to approach with clean hands but also clean mind, clean heart and clean objection.

64. It is held by the Supreme Court in case of **S.P. Chengal Varaya Naidu** (supra) that non-disclosure of relevant and material documents with a view to obtain advantage amounts to fraud on court and a judgment and order obtained by playing fraud is a nullity and *non-est* in the eyes of law. In my view, since the petitioner did not suppress any material facts from this Court when this Court admitted the company petition in absence of the respondent and passed a final order of winding up against the respondent when the respondent did not appear though was served and had knowledge of pendency of the proceedings, the judgment of the Supreme Court in case of **S.P. Chengal Varaya Naidu** (supra) would not assist the respondent. The registered office address of the respondent continued to be the same all through out, even till today at which the petitioner had sent papers

and proceedings and the notices to the respondent. The same registered office address was disclosed by the respondent even in the proceedings filed by it against the petitioner. Though this Court noticed these facts in the order passed by this Court on 24th November, 2016, this Court gave an opportunity to the respondent to defend the company petition on merits.

65. A perusal of the financial documents i.e. the balance sheet as on 31st March, 2014 produced on record by the petitioner of the respondent clearly indicates that the respondent has been suffering from losses. Though the respondent admittedly received more than Rs.4,00,00,000/- from those partners / sub-licencees introduced by the petitioner, the cash and the bank account of the respondent as on 31st March, 2014 showed as Rs.1,18,970/-. There is no revenue from the operations as on 31st March, 2013 and also 31st March, 2014. There is no other income as on 31st March, 2014. There is a loss of Rs.23,52,697/- as on 31st March, 2014 and Rs.3,68,587/- as on 31st March, 2013. The balance sheet of the respondent further indicates that as on 31st March, 2014, there is no General Reserve. The opening balance of the net loss is Rs.3,07,66,772/- as on 31st March, 2014. The respondent has reflected the receipt of advances from the licencees as on 31st March, 2014 as Rs.5,23,79,940/-. The value of tangible and intangible assets is also very negligible.

66. Insofar as the judgment of the Supreme Court in case if **IBA Health (I) Pvt. Ltd.** (supra) relied upon by the respondent is concerned, the Supreme Court in the said judgment has held that the dispute would be specific and genuine if it is *bonafide* and not spurious, speculative, illusory or misconceived. It is held that the

grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle.

67. It is held that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt. The Supreme Court has also held that if there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under section 434(1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under section 439 in reliance of the presumption under section 434(1)(a) that the company is unable to pay its debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.

68. In my view, in this case the defence of the respondent is totally spurious, speculative, illusory or misconceived and moonshine and not *bonafide* dispute on specific ground. The respondent is not able to avoid statutory demand by raising any specific dispute and thus deserves to face consequence of winding up on the ground that the respondent is unable to pay its debts. A perusal of the record

clearly indicates that the respondent is unable to pay its debts and deserves to be wound up.

69. I therefore, pass the following order :-

a). The Company Petition No.210 of 2012 is made absolute in terms of prayer clauses (a) and (b). The Official Liquidator already appointed by an order dated 14th November, 2014 to continue as Liquidator of the company.

b). The Official Liquidator to act on the authenticated copy of this order.

c). There shall be no order as to costs.

(R.D. DHANUKA, J.)