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

COMPANY PETITION NO. 145 OF 2015

Roptonal Limited, Cyprus …. Petitioner
Vs.
Friday Entertainment Ventures Pvt. Ltd., …. Respondent

Mr. Rashmin Khandekar a/w Mr. Prasad Shenoy and Mr. Anup Khaitan I/b Anup Khaitan and Co. for Petitioner.
Mr. Shyam Kapadia a/w Mr. Niket Jani i/b M/s Dhruve Liladhar and Co. for Respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 5th DECEMBER, 2017

P.C.

1. The petition is filed for winding up the Company Friday Entertainment Ventures Private Limited ("Company"). Petitioner and the company had entered into agreement on paper that was franked with Rs.20,000/- stamp duty on 31st December 2009. The agreement date is given 6th day of 2010, no month is mentioned. This agreement is for License of Exploitation Right – Overseas Theatrical for film "Rann". Under this agreement petitioner gave a consideration of Rs.1 crore to Company which was adjustable as mentioned in clause 4.5 and Clause 4.5 reads -

> *If the Distributor does not recover the Consideration & Exploitation Cost incurred by the Distributor for the Film, within the period of 90 days from the Release Date, then the deficit being 87.5% of the Revenue less Consideration & Exploitation Cost shall be refunded to the Distributor by the Company without any delay or protest, within the period of 15 days with a grace period of 30 days from the end of the aforesaid period of 90 days from the Release Date. In the event of any delay on such payment, the same will attract an interest*

of 12% per annum.

2. The terms 'Consideration', 'Exploitation Costs' and 'Revenues' are defined in the agreement as under.

> *'Agreement' shall mean this agreement and amendments thereto including the schedules annexure and exhibits attached to it or incorporated in it by reference to 'Consideration' means the amount agreed to be paid by the Distributor to the Company for the license of Rights of the Film, which is Rs.One Crorer and adjustable as mentioned under clause 4.5.*
>
> *'Exploitation Costs' means all costs and expenses relating to exploitation of the things including the cost of all Advertising (upto Rs.50 lacs) and Logistics (i.e freight and transportation for Prints and publicity materials from India and within the Territory (upto Rs.15 lacs) and any other direct distribution costs of the Film.*
>
> *'Revenues' shall mean and include all realized and collected incomes from the Rights less, show Tax, Entertainment Tax, any Local Taxes and/or other statutory charges thereto if any in force and less the exhibitor's share of the box office receipts but will not exclude any tax withheld or deducted at source from such amounts.*

3. It is the case of petitioner that the film has not been able to generate sufficient revenue to re-coup petitioner's consideration and exploitation cost and therefore as provided under clause 4.5 of the agreement, the company had agreed to refund petitioner such deposit and according to petitioner the deposit amount was Rs.67,36,201/- as on 29th May, 2010. According to petitioner, this is a debt which the company is unable to pay and therefore the company has to be wound up.

4. Admittedly, no reply has been given by the company to the statutory notice. Admittedly, no affidavit in reply opposing this petition has also been filed.

5. Shri Kapadia for respondent requested for some time today to file a reply, which was declined, the petition itself has been served way back in 2013-2014.

6. To a query posed by the Court, Shri Khandekar appearing for petitioner submitted that where no response to statutory notice has been made, the court may pass a winding up order on the basis that amount claimed has not been denied by the company and there is a presumption of inability to pay by the company. Mr. Khandekar in support of his submission, relied upon three judgments ; (a) *Resham Singh & Co. Pvt. Ltd. -Vs- Daewoo Motors India Ltd*[1]*, (b) Nauranglal Agarwal -Vs- Ramsarup Industries Ltd.*[2] *and (c) Coal India Limited -Vs- NICCO Corporation Limited*[3].

7. It is settled law and I find support from the 3 judgments relied upon by Shri Khandekar that failure to reply to the notice is only an important factor for determining whether a bonafide defence has been put forward. Where no response had been made to the statutory notice, the Respondent Company runs a risk of winding up petition being admitted for hearing at the threshold stage itself. Admission of the petition at its first hearing is possible because, by virtue of Section 434 of the Companies Act, 1956, a presumption of the indebtedness can be legitimately drawn by the Court where no reply to the statutory notice is forthcoming. At the same time, if there is no reply to the statutory notice that would not mean that the court will in every matter presume indebtedness of the company.

8. In this case there is nothing on record to show how the

---

1 2003 (66) DRJ 511

2 2010 (160) Company cases 55 (Calcutta)

3 2010 (157) Company cases 521 (Calcutta)

petitioner arrived at the figure of Rs.67,36,201/- as mentioned in particulars of claim. Shri Khandekar, counsel for petitioner agreed that petitioner has not explained in this petition how they arrived at the figure of Rs. 67,36,201/-. Mr. Khandekar, however, submitted that the company has not denied this figure by giving a reply to the statutory notice and therefore the court should presume that the amount is admitted and there is inability of the company to pay.

9. Least I would expect that the petitioner would atleast have shown as to how this final figure of Rs.67,36,201/- was arrived at. I am also not willing to accept this figure as a crystallized amount or debt because in the copy of a letter dated 18th October 2010 from petitioner to the company annexed to the petition, the amount mentioned therein is Rs.69,16,527/- as payable by the company. In another undated letter from petitioner, copy whereof is at Exh. "C" to the petition, again the amount mentioned is Rs.69,16,527/-. In the statutory notice dated 5th April 2012 copy whereof is at Exh.D to the petition, the amount claimed Rs.67,36,201/-. The subject mentioned in the undated letter at Exh "C" to petition referred to earlier reads as under :

> *"Recovery of Rs.69,16,527/- (Rupees Sixty Nine Lacs Sixteen Thousand Five Hundred and Twenty Seven Only) due and payable to our client. The Indian Film Company (Cyprus) Limited by you i.e Friday Entertainment Ventures Private Limited alongwith interest of 12% p.a. calculated from 15th June, 2010".*

In the statutory notice at Exh.D, the subject given is almost identical to the subject in Exh.C, but the alleged recovery figure shown is Rs.67,36,201/-. In a further notice sent on 4th September 2012 by petitioner to company invoking the arbitration clause the amount again goes up to Rs.69,16,527/- in paragraph 4 and paragraph 8, but in paragraph 9 the amount mentioned is Rs.67,36,201/-. Therefore, it is quite clear that petitioner itself is not clear as to what is the amount that has to be recovered from the Company. In this background, I am unable to presume any inability by the Company to pay any amount or arrive at a presumption of indebtedness by the company to petitioner.

10. In the circumstances, petition dismissed with no order as to cost.

(K.R. SHRIRAM, J.)