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

COMPANY PETITION No. 869 OF 2015

Rupa Dalmia … Petitioner
Vs.
M/s. Trans Frieght Containers Ltd.
CIN No. L34203MH1974PLC018009 … Respondent

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Mr. Pranav Sampat, Haabil Vahanvaty i/b Khaitan & Co., for the Petitioner.

Mr. Nimay Dave a/w Shanay Shah i/b Bachubhai Munim & Co., for the Respondent.

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CORAM : A. K. MENON, J.

DATE : SEPTEMBER 20, 2017

PC :

1. By this petition, Petitioner seeks an order of winding up of a Respondent Company. The Petitioner, an individual, claims to have lent and advanced a sum of Rs. 65,00,000/- to the Company. Interest thereon is stated to be payable @ 15% per annum. This amount was, admittedly, lent in April 1998. The petition proceeds on the basis that the fact of loan having been advanced, has been admitted

by the Respondent Company in various records, including in the account confirmation letter for financial years 1998-99 onwards right upto 2008-09. Copies of these letters are annexed to the petition.

2. According to Mr. Sampat, learned counsel appearing for the Petitioner, after providing the advance, certain part payments were made by the Respondent Company and an amount of Rs. 60,48,920/- is due and payable by the Respondent to the Petitioner. He has relied upon the entries to this effect in Schedule "A", disclosing the UNSECURED LOANS, as of 31st March, 2010, as reflected in the Annexure to the Auditor's report, forming part of the balance sheet and profit and loss account of the Company. Mr. Sampat invited my attention to the entry under the caption "OTHERS (without interest)" in Schedule "A" of the "Unsecured Loans" wherein the name of Petitioner figures and against her name a sum of Rs. 60,48,920/- is shown due as on 31st March, 2010. Relying upon the aforesaid admission, Mr. Sampat submitted that there cannot be any manner of doubt that Rs. 60,48,920/- is due, as the principal sum outstanding since the Schedule has listed the name of the Petitioner under the heading "Others (without interest)". According to Mr. Sampat, the

amount of Rs. 60,48,920/- is due and payable along with interest @ 15% per annum.

3. According to Mr. Sampat, even after the repeated assurances, the Respondent Company failed and neglected to make the said payment, and since the amount had not been repaid over a period of time, vide letter dated May 8, 2013, the Petitioner recalled the personal loan of Rs. 60,48,920/-. Copy of the said letter is annexed at Exhibit “N” to the petition. It records the fact that friendly loans have been advanced in 1998 when the Respondent Company was in financial crunch, and on the request made by the then Managing Director Mr. Ashok Kumar Dalmia for financial assistance, the Petitioner advanced loan of Rs. 60,48,920/- with interest thereon @ 15% per annum. The Petitioner expressed her need for the funds, and therefore, decided to recall the loan. The Petitioner recalled loan and demanded payment of Rs. 60,48,920/- alongwith interest thereon @ 15% per annum.

4. The Company has not complied the Petitioner's statutory notice dated 28th June, 2013. The Company responded on 19th July, 2013 denying its liability. It is the Company's case that there was a

family arrangement by virtue of which the amounts were advanced. The loans were not repayable on demand. Late Niranjanlal Dalmia (“Niranjanlal”), who was the grand-father of the Petitioner and head of the Dalmia family and Chairman of the Respondent Company had placed Inter-Corporate Deposits (“ICDs) with various entities, some of which were not repaid to the Company. In view of the Company being in need of funds in the year 1998, due to losses suffered resulting from adverse market conditions, it had borrowed monies from various sources. It is contended that Niranjanlal had taken moral responsibility for repayment of various sums, as also placement of the ICDs, and therefore, requested his family members to bring in a sum of about Rs. 12 crores by way of personal unsecured loans on the understanding that the Company would repay this loan after recovery of the amounts, payable to the Company, under the ICDs.

5. According to Mr. Dave, learned counsel appearing for the Respondent Company, though the amount of Rs. 65 lakh was lent in advance by the Petitioner, the said amount could not be repaid unless and until the amounts of ICDs are recovered from the beneficiaries of ICDs. Mr. Dave submitted that unfortunately financial health of the

Company did not improve and for some period interest has been paid @ 12% per annum as against 15% claim made by the Petitioner. The Company stopped payment of interest for want of funds, and on or about 31st March, 2001 the Company wrote off part of ICDs aggregating Rs.9.20 crores as bad debts since recovery was not possible. According to the Company, the remainder of the ICDs were expected to be recovered but were not actually recovered and Naranjanlal had chosen not to initiate any legal proceedings against the debtors under the ICDs on account of personal relations, he had with the entities concerned. Mr Dave therefore, submitted that over all family arrangement which was put in place by Niranjanlal continued to be in operation and observed by all members of the family till his demise. It is only after his demise on or around 2005 the disputes and differences arose between various branches of the family. Mr. Dave submitted that present claim is the result of one of the disputes. Other family members have also made similar claims.

6. The contentions raised in the petition have also been refuted in affidavit in reply dated 5th April, 2017 filed by one Ashok Dalmia, Managing Director of the Respondent Company. The

affidavit in reply substantially relies upon the contents of the reply to the statutory notice. Mr. Dave referred to the admission in para 3.7 of the affidavit in reply filed on behalf of the Respondent that principal amount of Rs. 65 lakh was received by the Company by way of cheque dated 29th May, 1998 under the directions of Niranjanlal. He submitted that the funds were not, in fact, belonging to the Petitioner but the Petitioner's grand-father. According to him, the loan amount was liable to be repaid only on the Company recovering the ICD amounts from various entities. This aspect of the matter, however, is not averred as part of the family arrangement.

7. Mr Dave further submitted that the Petitioner herself was minor when the amount was advanced. This statement is contested by Mr. Sampat. He submits that Petitioner was 26 years of age when the amounts were advanced. These contentions are not relevant since, admittedly, the amount is received by the cheque from the Petitioner on 29th May, 1998. In view of this admission, this controversy as to entitlement of the Petitioner to receive the loan advanced must rest.

8 Mr. Dave made a reference to para 3.1. of the affidavit in reply and the facts narrated therein. While admitting that debts were

not declared as bad debts, and the remainder was still due as per the books of the Respondent Company, the argument is that only upon recovery of the amounts of ICDs, the Petitioner's loan and those of other family members, would be repaid. In other words, unless the ICDs amounts are recovered from the recipients, the loans and advances of the family members will not be repaid. This is the main case of the Respondent's defence.

9. Mr. Dave also contended that the amount under the claim made by the Petitioner in the statutory notice, and as reflected in particulars of the claim of the Petitioner, is not an amount due and payable, as contemplated under Section 434 of the Companies Act, inasmuch as at the time of making the demand, the amount was not due because overall arrangement required that these amounts are to be paid only after recovery of ICDs. The recovery of the ICDs was a condition precedent to repayment of the loans taken from the family members of Niranjanlal. He therefore, submitted that the very foundation of the winding up petition is questionable, and for this reason petition ought not to be admitted, and in view of the undisputed fact that though other family members had also contributed the loan

advanced to the Company, they had not made any grievance, and therefore, on this ground the petition requires to be dismissed. Mr. Dave also submitted that his defence is buttressed by the fact that for more than 15 years the Respondent had not paid any interest or made any part-payment, which fact further strengthens the defence and weakens the case of the Petitioner. The Petitioner herself had not made any demand till she addressed a letter dated 8th May, 2013. He submitted that it is not possible to accept the contention of the Petitioner that though the amount was due and payable since for 13 long years, the Petitioner has not chosen to make any demand, and this is for the reason that she was well aware of the family arrangement and commitments made by the said Niranjanlal. Finally, Mr. Dave submitted that claim in the present petition is an inflated sum and not a determined debt, payable, as contemplated under the Companies Act.

10. In this context, he submitted that interest rate itself is in dispute. The Petitioner on one hand claims interest @ 15% per annum on the principal sum and the evidence on record, on the other hand, suggests that from the year 2000 interest was paid @ 12% per annum, as reflected in para 3.9 of the affidavit in reply and TDS is also

deducted at this rate. This aspect is not in dispute since TDS certificates have been issued by the Company, which are annexed at Exhibit "A" and Exhibit "B" to the petition. In support of this submission, Mr. Dave relied upon following judgments:

(i) *Hari Shankar Singhania & Ors. Vs. Gaur Hari Singhania & Ors.*[1]*;*

(ii) Kesar Enterprises Ltd. Vs. IDI Ltd.[2]*;*

(iii) IBA Health (India) Pvt. Ltd. Vs. Info-Drive Systems SDN. BHD.[3]

(iv) Sahu Madho Das & Ors. Vs. Pandit Mukand Ram & Anr.[4]*;*

11. Mr. Dave relying upon decision of the Apex Court in the case of *Hari Shankar Singhania (supra)*, particularly in para 41, 44 and 49 of said judgment, submitted that cases where there is family arrangement, the Court must treat it differently from other formal commercial settlements and not take a highly technical view, which may put at risk in settlement, drawn up by the family. He invited my attention to the paras of judgments of other courts, referred in the said judgment, in support of his contention that the family arrangement

1 2006 SC 2488
2 2002 (112) Company Cases 174 (Bombay)
3 (2010) 10 Supreme Court Cases 553
4 AIR 1955 SC 481

pleaded by the respondent company through deponent of the affidavit in reply must be the basis on which petitioner can make any claim. In view of this family arrangement, the contention raised in the petition by the Petitioner cannot be accepted as it is an undisputed debt as contemplated under the Companies Act. He relied upon observations of the Apex Court in the case of *Sahu Madho (supra)* in support of his contention that the claim in the petition, being an inflated claim, cannot be sustained.

12. Relying on the decision of this Court in the case of Kesar Enterprises Ltd. (supra), Mr. Dave submitted that the very basis of the winding up petition was that a huge and inflated claim was made by the petitioner to coerce the respondent company, and in fact, that claim is bona fide disputed by the respondent-company. The claim would require leading of evidence since the claim was not admitted. In such circumstances, this Court had observed that when the claim is inflated it cannot have the character of debt and would therefore, fall under disputed claims and not susceptible to any statutory notice or a winding up proceeding, based thereon. He also relied upon observations of the Supreme Court in Amalgamated Commercial Traders

(P.) Ltd. Vs. Krishnaswami (A.C.K.)[1] and submitted that by the winding up petition, the Petitioner is seeking to enforce payment of the debt which is bona fide disputed by the company. The petition presented ostensibly for a winding up order but really to exercise pressure and must therefore, be dismissed.

13. Finally, Mr. Dave relied on the decision in the case of IBA Health (India) Pvt. Ltd. (supra) to submit that company solvency must be ascertained. In para 20 of the said judgment the Apex Court has discussed the consequences as to the substantial dispute.

14. Mr. Dave submitted that in the present case debt is bona fide disputed, and therefore, petition deserves to dismissed. Mr. Sampat countered this contention, reiterating the claim in the petition and disputing the fact that there was any such family arrangement, and contending that no evidence of such an arrangement is forthcoming from the Respondent Company. Then he submitted that a public limited company cannot be heard to rely upon the private family arrangement amongst members of the family, which may have interest in the company. He reiterated the fact that Petitioner was 26 years of

1 [1965] 35 Company Cases 456 (SC)

age when the amount was advanced, admittedly, by cheque. Furthermore, he submitted that the very basis of the defence inasmuch as Mr. Dave's contention that debt was to be repaid fully on the basis of proceedings of recovery of ICDs, cannot be believed, since admittedly, Company had made part-payments, as reflected in the particulars of claim, and as admitted by the Company in its schedule of unsecured loan, referred to above, wherein a sum of Rs. 60,48,920/- is shown as an admitted amount without interest. Read with the fact that amount actually lent in advance was a sum of Rs. 65 lakh, the admission that amount of Rs. 60,48,920/- having been due and payable, and that the part-payments have been made, and also considering the fact that the interest has already been paid over a period of time, Mr. Sampat submitted that the defence has no basis in fact.

15. Having heard the learned counsel for the parties and perused the documents and pleadings, it is evident that the amount having been lent in advance is not in dispute. In fact, there is an express admission that a sum of Rs. 60,48,920/- is due to the Petitioner and that amount has been certified to be so due, in the

Auditor's report dated 31st August, 2010. The Auditor's report is an admitted document which refers to various unsecured loan from persons who appear to be family members and other corporate entities, and includes the present Petitioner. This amount is undisputedly due without interest. Even assuming that Mr. Dave is right in his contention that this amount is due till the amounts of ICDs are recovered, it is pertinent to note that in the affidavit in reply the deponent has expressly stated that, late Naranjanlal Dalmia. in view of the good relations, had written off Rs. 9.20 crores of the ICDs. The memorandum of the ICDs indicates that though the due amounts of the ICDs were not recovered, no action was taken by late Mr. Dalmia, in spite of not being declared as bad debts, since, he had personal relations with owners of various entities with whom deposits were placed. These are, admittedly, the deposits placed prior to 1998. The entire basis of the defence reveals the weak financial position of the Company, at the material time and which had caused Niranjanlal to seek contributions from family members as loans and advances. Considering the fact that no particulars of ICDs have been provided by the Company, it is not possible to accept the contention of the

Respondent Company and as canvassed by Mr. Dave that the amount was not due as on the date of statutory notice. Considering over all controversy between the parties, even as pleaded, the amount of the loan being admitted, it is not possible to accept contention raised on behalf of the Respondent that the amount of loan would not fall due unless and until the ICDs are encashed. Indeed, consequences of accepting such a defence would be that amount of the unsecured loans would not be repayable at all since the Company has not taken up any steps for recovery of ICDs, read with the fact that the claim is possibly barred by the law of limitation, as on the date, and there appears no possibility of recovery of the amounts of the ICDs. The Company has not disclosed particulars of ICDs or their due dates or whether these ICDs have been renewed or whether the interest is being paid on the ICDs from time to time. This would have otherwise enabled the Petitioner and the Court to take a view on the veracity of the Company's defence that these ICDs were not still declared as “bad debts”, in the books of the Company, as pleaded in para 3.12 of the affidavit in reply.

16. Moreover, in the course of submissions, I invited

attention of Mr. Dave to the chart, annexed at Exhibit D to the affidavit in reply, which contains statement of “Dalmia family loans”. In the statement (mentioned in para 3.5 of the affidavit in reply) the Company has annexed list of loans advanced by the Dalmia family to the Company, which is at Exhibit B to the said reply. The 7th item entry, in the said statement, identifies the name of the Petitioner as having advanced the loan and the principal amount shown against her name, a sum of Rs. 47,09,550/-, indicating the principal sum advanced and still owing to the Petitioner the aforesaid amount. In the affidavit, in no uncertain terms it is admitted that the principal sum of Rs. 47,09,550/- is due. If this is read with the fact that original principal sum lent in advance was, admittedly, Rs. 65 lakh, the Company's defence, that no loan advances were due till the amounts of ICDs are recovered, is falsified. I am satisfied that the petition is not filed merely to exert pressure. The Respondent does not set up any defence which is substantiated. On the other hand, it seeks to mask the liability with plea that the debt is not repayable until recovery of the amount of the ICDs. This is on the face of admitted part-payment, as discussed above. The defence is thus a dishonest one. In the circumstances, the contention that repayment was only subject to the recovery of ICDs is moonshine.

17. The Respondent Company, even otherwise, appears to be under severe financial stress and was recording losses, as revealed from the 42nd Annual Report for the year ended 31st March, 2016, which is annexed at Exhibit A to the affidavit in rejoinder. The profit and loss account statement indicates that for the year ended March, 2016, the Company had incurred loss of Rs. 35.60 Lakh. Although the profit & loss statement shows loss of Rs. 247.48 Lakh for the year ended 31 March, 2015, still, the Respondent Company had failed to repay the principal sum demanded and as admitted, and as indicated in Exhibit “B”, annexed to the affidavit in reply. It is therefore, apparent that Respondent is liable to pay the debts but is unable to do so. The Company must therefore, be put to terms to demonstrate its solvency. In the circumstances, I pass the following order.

(i) The Respondent Company shall deposit with the Prothonotary & Senior Master Rs. 50,00,000/- within six weeks from today.

(ii) If the above amount is deposited, and the Petitioner files a suit for recovery, the abovesaid amount shall be transferred to that suit account.

(iii) If the amount is not so deposited, the petition shall revive and shall stand admitted, and within six weeks from the date of default, admission of the petition shall be advertised in two local newspapers i.e. Free Press Journal (in English) and Navshakti (in Marathi) and in the Maharashtra Government Gazette. Delay in publication of the advertisement in the Maharashtra Government Gazette shall not invalidate the advertisement and shall not constitute non-compliance of the direction or of the Company (Court) Rules, 1959.

(iv) The Petitioner shall deposit an amount of Rs. 10,000/- with the Prothonotary and Senior Master of this Court towards publication charges within two weeks from the date of default, with an intimation to the Company Registrar, failing which the company petition shall stand dismissed for non prosecution.

(v) Company petition is disposed off in the above terms with liberty to revive the same in the event of default.

Sd/-
[A. K. MENON, J.]

Vinayak Halemath