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

COMPANY PETITION NO.273 OF 2016

Ping Pong East Limited)....Petitioner
V/s.
Mirah Hospitality and Food Solutions Pvt. Ltd.)....Respondent

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Mr.Mustafa Doctor, Senior Advocate a/w Mr.Ayush Agarwal, Mr.C.Nageshwaran and Ms.Devangshi Nath i/by Khaitan and Co. for petitioner.
Mr.Sharan Jagtiani a/w Mr.Aditya Raut i/by Desai Desai Carrimjee & Mulla for respondent.

CORAM : K.R.SHRIRAM,J
DATE : 9.2.2018

P.C.:-

1 The petition is filed for winding up of the company Mirah Hospitality and Food Solutions Pvt. Ltd. (the company) on the ground that the company is indebted to petitioner, is unable to discharge its debts, commercially insolvent and hence required to be wound up.

2 As stated in the petition, petitioner has developed and is owner of what is called "Ping Pong Restaurant Concept". The company's main object is to carry on the business of running hotels, clubs, health clubs, restaurants etc.

3 The company and one Mirah Food Solutions Pvt. Ltd.

(Mirah Foods) are both part of the Mirah Group of companies. It is stated in the petition that Mirah Group of Companies are under control of one Gaurav Goenka who is a director of Mirah Foods and also the Company.

4 On 2.8.2012, petitioner entered into development agreement with the company and Mirah Foods. Mirah Foods is described in the agreement as Developer and the company is described as Guarantor. As per the terms of the agreement, petitioner gave Mirah Foods exclusive development rights to open and operate Ping Pong Restaurant business in the territory of Maharashtra & Goa on the terms and conditions as set out therein. As per the agreement, Mirah Foods was required to pay petitioner a territory fee to develop the territory by entering into Operating Agreements with petitioner to open Ping Pong restaurant and operate them under Operating Agreements. The territory fee payable under development agreement was paid by Mirah Foods to petitioner sometime in October-2012. There were other fees payable to petitioner like monthly service fee of 5% and monthly contribution of 2% of the gross turnover of each Ping Pong Restaurant and operated under the Operating Agreement, that was to be paid by Mirah Foods.

5 On or about 1.7.2013, petitioner and Mirah Foods executed an agreement titled `Ping Pong Operating Agreement for Maharashtra & Goa'. Under the Operating Agreement, petitioner permitted the company to open a Ping Pong restaurant in Mumbai. Operating agreement contained clauses similar to development agreement with regard to payments that were required to be made by Mirah Foods to petitioner. Under the Operating Agreement Mirah Foods was also to pay cost of food and services supplied by affiliates of petitioner. As per the terms of schedule 11 of the Development Agreement, the company undertook to guarantee amounts payable by Mirah Foods to petitioner. Both, under Development Agreement and also Operating Agreement entered into between the parties, the company also agreed to pay interest on all sums demanded under the guarantee from the date of demand until date of payment @ 4% p.a. above the GBP sterling base rate of a bank nominated by petitioner from time to time or at the maximum rate permissible by applicable Legal requirements if this is lower. This petition basically depends on interpretation of certain provisions of schedule-11 of Ping Pong Development Agreement for Maharashtra and Goa, India and in particular clause-13 therein and it will be useful to reproduce the same :-

" Schedule 11

The Guarantor's Covenants

1. In consideration of us granting you the rights under this Agreement and allowing the Guarantor access to our Know-How, the Guarantor undertakes to be bound by obligations identical to those accepted by you in Clause 9 above.

2. In consideration of us granting you the rights under this Agreement, the Guarantor further covenants and undertakes with us :

(a) that you will duly observe and perform all the obligations contained in this Agreement and each Operating Agreement which are to beobserved and performed by you;

(b) that if you fail to observe or perform any of the said obligations or fail to pay any sums which may be payable to us under this Agreement and each Operating Agreement, the Guarantor will be liable for such default and will make payment of any sums so due upon demand being made by us ; and

(c) as a distinct and separate obligation, the Guarantor will indemnify us and render us harmless in respect of all losses, damages, claims costs and expenses which we may incur or suffer by reason of its entry into or continuance of or termination (in any way) of this Agreement and each Operating Agreement.

3. The terms of this Schedule are in addition to and not in substitution for any other rights which we may have or security which we may hold for the payment of monies due to us under or by virtue of this Agreement and each Operating Agreement and may be enforced without first having recourse to any such rights or securities and without first taking any steps or proceedings against you.

4. The Guarantee and Indemnity will extend to the *ultimate balance of all sums guaranteed hereunder including but not restricted to the full value of the Territory Fee and all fees and costs due under the Operating Agreements (including those relating to the supply of products and equipment from us and/or Affiliates) regardless of any intermediate payment or discharge in whole or in part.*

5. The Guarantee and Indemnity is and will remain a continuing security for your obligations to us hereunder at any time and will not be satisfied or otherwise affected by any repayment or recovery from time to time of the whole or any part of any amount which may then be due and owing from you to us.

6. The Guarantee will continue and will be enforceable notwithstanding any change in the name or the constitution of us or you.

7. The Guarantor will not in competition with or in priority to us seek to enforce repayment or to exercise any other rights or legal remedies of whatsoever kind which may accrue to the Guarantor in respect of any amount which may have been paid by the Guarantor to us hereunder, and in particular (without prejudice to the generality of the foregoing) will not make any claim against you nor make any claim in the bankruptcy or liquidation of you nor enforce any security from or against you.

8. The Guarantor agrees to pay interest to us on all sums demanded under the Guarantee from the date of demand until the date of payment at four percent (4%) per annum above the GBP Sterling base rate of a bank nominated by us from time to time (or at the maximum rate permissible by applicable Legal Requirements if this is lower) from the date payment became due until payment (as well after as before judgment).

9. The Guarantor's obligations under the Guarantee are those of a primary obligor and exist irrespective of any total or partial invalidity of any purported obligation or *liability of you to us.*

10. As a separate and independent stipulation the Guarantor agrees that if any sum arising or purportedly arising under the guarantee and indemnities contained in this Schedule is not or would not be recoverable on the footingof a guarantee or indemnity for any reason whatsoever, whether or not known to us, such sum will nevertheless be recoverable from the Guarantor as a sole principal debtor and will be paid by the Guarantor to us on demand.

11. The Guarantor acknowledges and agrees that none of its liabilities under the Guarantee and Indemnity will be reduced, discharged or otherwise adversely affected by :

(a) any variation, extension, release, discharge, compromise, dealing with, exchange or renewal of any security and of any other right or remedy which we may now or at any time have from or against you or any other person in respect of any of the obligations and liabilities of you or any other person;

(b) any act or omission by us or any other person in taking up, preserving, perfecting or enforcing any security from or against you or any other person ;

(c) any termination, amendment, variation, novation or supplement of or to any agreement (oral or in writing) accommodation or transaction with or in connection with you or any other person ;

(d) the insolvency, bankruptcy, liquidation, administration, winding-up, incapacity, limitation, disability, discharge by operation of law, change in the constitution, name and style of you or any other person ;

(e) any security or other right or remedy held by or available to us being or becoming void, voidable or unenforceable on any ground whatsoever and whether

in whole or in part ;

(f) any claim or enforceable of payment from you or any other person ;

(g) any grant of time, indulgence, waiver or concession to you or any other person ; or
(h) any act or omission which would not have discharged or affected the liability of a sole principal debtor instead of a guarantor or indemnitor or by anything done or omitted to be done by us or any other person or by any other act, matter or thing which but for this provision might operate to exonerate or discharge the Guarantor or otherwise reduce or extinguish its liability under the Guarantee and Indemnity.

12. We may enforce the Guarantee and Indemnity whether or not we have first :

(a) taken action or obtained judgment in any court against you or any other person ;

(b) made or filed any claim in bankruptcy, liquidation, administration or insolvency against you or any other person ; or

(c) made demand upon, or enforced any claim, right or remedy against you or any other person.

13. The Guarantor has entered into this Agreement in consideration of us granting you the rights detailed in this Agreement and it is not intended that the Guarantor acquires any rights under this Agreement or at all against us, our officers, employees and agents. However, in the event that the Guarantor does acquire any rights against us, our officers, employees or against, it hereby waives all such rights and agrees to waive any such rights that accrue in the future. Furthermore, the Guarantor agrees and acknowledges that this Guarantee and Indemnity will survive the expiry or termination of this Agreement <u>and shall remain in force until such time</u>

<u>as the last Ping Pong Restaurant operated by you ceases to trade."</u>

6 The Bombay restaurant started by Mirah Foods ran for about nine months and for reasons, which we need not go into in this petition, the business arrangement did not take off as well as it was expected to. This also resulted, it is alleged in petition, in Mirah Foods not making the payments that they were required to in the time schedule in which the payments were to be made. It is stated in the petition that several invoices that were raised on Mirah Foods remained unpaid. Petitioner also stated that Mr.Gaurav Goenka on behalf of Mirah Foods by e-mail dated 6.8.2014, acknowledged liability to petitioner in the sum of USD 162,850.93 + GBP 6,500/-. It is also stated that as admitted amount was not paid by Mirah Foods, petitioner through its advocate caused a statutory notice as required under the provisions of Companies Act, 1956 issued to Mirah Foods and in reply Mirah Foods acknowledged its liability but raised other grounds as to why the amounts were not payable.

7 The restaurant business started on 6.9.2013 but by an email dated 3.1.2014, petitioner gave four weeks notice terminating the agreements. The termination was to take effect on 31.1.2014.

The termination was accepted by Mirah Foods and Mirah Foods by its emails dated 18.6.2014 and 20.6.2014 informed petitioner that it would be ceased operations of the Ping Pong restaurant by 22.6.2014.

8 It should also be noted that in the termination e-mail dated 3.1.2014, petitioner gave an assurance to Mirah Foods that it will not be shutting down the Ping Pong restaurant but would seek for an alternative operator to take the territory and existing site, thereby reimbursing Mirah Foods for the capital expenditure (CAPEX) invested into the site as per the franchise agreement.

Mr.Jagtiani states that because of this assurance, Mirah Foods accepted the termination.

9 As no payments came forth from Mirah Foods, petitioner issued, for the first time, a notice dated 6.11.2015 to the company invoking the guarantee. In reply, the company through its letter dated 23.11.2015 denied its liability and one of the primary defence raised is that under clause-13 of schedule 11, the obligations of the company under Development Agreement were limited and it was expressly stated that obligation will remain in force still the last Ping Pong Restaurant operated by Mirah Foods ceases to trade and since Mirah Foods ceased to trade with effect from 22.6.2014, there was no

surviving obligations on the part of the company and therefore, invocation was bad.

10 In response, petitioner caused a notice dated 26.11.2015 issued through their advocates under Sections 433 and 434 of the Companies Act 1956 and the company replied by its advocate's letter dated 9.12.2015, basically reiterating what is stated in the earlier reply dated 23.11.2015. Hence, the petition.

11 It is settled law that an order of winding up of a company is a discretionary order. Courts admit petitions for winding up when it finds that the defence taken by the company is either moonshine or bogus. If the court, after hearing the parties, feels that there is a triable issue as to the meaning or correctness of any document on which the claim is based or the alleged fact are of such nature which raises disputed questions of fact or where clauses have to be interpreted to determine whether there is a liability or otherwise, the petition for winding up should not be entertained.

12 Lot of emphasis was placed by Mr.Doctor on the correspondence exchanged between Mirah Foods and petitioner to submit that petitioner had acknowledged its liability. Undoubtedly,

there are emails from Mirah Foods to petitioner, particularly email dated 5-6.8.2013 where Mirah Foods has forwarded outstanding statement and payment schedule to petitioner. There is no communication, however, from the company to petitioner acknowledging its liability. The first communication that the company ever received from petitioner is dated 6.11.2015 and promptly by its letter dated 23.11.2015 company has denied its liability on the ground that the time to invoke guarantee has lapsed because the last Ping Pong Restaurant stopped operating with effect from 22.6.2014. If one considers schedule-11 in its entirety, it does indicate that guarantee will survive termination. At the same time, in clause-13 the last sentence reads as under :-

> *"Furthermore, the Guarantor agrees and acknowledges that this Guarantee and Indemnity will survive the expiry or termination of this Agreement <u>and shall remain in force until such time as the last Ping Pong Restaurant operated by you ceases to trade.</u>"*
>
> *(emphasis supplied)*

13 Mr.Doctor submitted that it only means that the guarantee and indemnity will survive the expiry or termination of the agreement but the agreement will be in force till the last restaurant ceases to trade. If that was the intention of the parties, the portion "and shall remain in force until such time as the last Ping Pong Restaurant

operated by you ceases to trade" is otiose. This certainly requires consideration and therefore, I cannot brush aside the company's defence as moonshine or bogus. The stand of the company is reasonably arguable. If petitioner had filed a summary suit against the company, certainly, in view of the defence raised by the company, in my view, unconditional leave would have been granted.

14 By clarifying that I am not expressing my views or opinion on the interpretation of schedule-11, which is left open to be decided in the appropriate forum, the petition stands dismissed.

(K.R.SHRIRAM,J)