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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY APPLICATION (L) No.592 of 2018
IN
REVIEW PETITION (COMPANY) (L) NO.11 OF 2018
IN
COMPANY PETITION NO.468 OF 2013
WITH
REVIEW PETITION (COMPANY) (L) NO.11 OF 2018
IN
COMPANY PETITION NO.468 OF 2013

Kumar Motors Private Limited ...Applicant/Petitioner

vs.

Innoventive Industries Limited (In Liquidation) ...Respondent

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Mr. Rahul Narichaniya, Senior Advocate, a/w. Mr. Zal Andhyarujina, Counsel, Mr. Vishnu Shriram and Ms. Shruti Sardesai, i/b. Phoenix Legal, for the Applicant/Petitioner in Review Petition.

Mr. Ashish Kamat, a/w. Mr. Akshay Puranik, Ms. Yasmin Godrej and Ms. Priyanka Deshmukh, i/b. Crawford Bayley & Co., for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED : OCTOBER 24, 2018

P.C. :

. Heard learned Counsel for the parties. This review petition seeks review of an order passed by this Court on 4 August 2015 in a company petition between the parties. The Review Petitioner was a Respondent to the company winding up petition and the Respondent to the review petition the Petitioner.

2. The company petition sought winding up of the Respondent

Company on the ground of its inability to pay a debt, which arose out of a Subscription and Shareholders Agreement (“SSA”), under which the Respondent/original Petitioner inter alia agreed to invest in the Respondent Company against issuance of warrants and equity shares. The Petitioner's case before the Court was that the Petitioner advanced an aggregate sum of Rs.8,70,03,374/- to the Respondent in the manner stated in the petition. The SSA contained certain obligations on the part of the Petitioner, one of them being under Clause 4A.1(a) to arrange for a loan of Rs.6 crores or bring in an amount of Rs.6 crores in the company till such loan was arranged. Subject to fulfillment of such obligations, Clause 2.1 of the SSA inter alia required the Respondent Company to issue share warrants to the Petitioner and convert such warrants into shares at a stipulated warrant exercise price. The dispute, according to the Petitioner, concerned allotment of the warrants and adjustment against warrant exercise price payable at the time of conversion of the warrants into shares. It was the Petitioner's case that the obligations specified in the SSA, fulfillment whereof was a condition precedent for conversion of the warrants into warrant shares, were fulfilled by the Petitioner and yet the Respondent failed to issue the warrants and convert them into warrant shares as envisaged in the SSA. The Petitioner, accordingly, terminated the SSA and demanded return of its monies from the Respondent Company. This amount was said to be the debt due and owing by the Respondent, and on which the company winding up petition was filed.

3. The order of 4 August 2015 disposing of the winding up petition inter alia records that it was common ground between the parties that the debt arranged/paid by the Petitioner in the sum of Rs.6 crores (from out of the sum of Rs.8.70 crores referred to above) in terms of Clause

4A.1(b) was to be adjusted towards the subscription amount for the warrants to be issued to the Petitioner in terms of Clause 2.1 of the SSA. So also, it is observed in the order that the Petitioner was to subscribe to the investor shares and warrants in terms of the SSA and the amount of the Petitioner with the Respondent Company was to be adjusted towards the subscription amount and the warrant exercise price in terms of the SSA. The present review petition is on the basis that it was neither pleaded nor argued by the Respondent Company (the present Review Petitioner) that the debt arranged/paid by the Petitioner in the sum of Rs.6 crores in terms of Clause 4A.1(a) of SSA was to be adjusted towards the subscription amount for warrants to be issued by the Petitioner in terms of Clause 2.1 of the SSA or that it was admitted by the Respondent Company that the Petitioner was to subscribe to the shares and warrants in the Respondent Company after arranging the debt of Rs.6 crores and that the amount invested by the Petitioner in the Respondent was to be adjusted in the share subscription amount and the warrant exercise price in terms of the SSA. In other words, it is claimed that the observations made in the order under review about the common ground or the admitted position, as indicated above, were not factually correct.

4. It is pertinent to note that the order under review was carried before the appeal court in a challenge. It was contended before the appeal court that the observations of this Court concerning the aforesaid common ground and admitted position, were factually incorrect. Since this contention was not entertained by the appeal court, a permission was sought from the appeal court to withdraw the appeal with liberty to file appropriate proceedings before this Court, i.e. the Company Court, seeking an appropriate clarification in this behalf and then prefer a fresh appeal against

the impugned order if any such occasion arose. The appeal was, accordingly, dismissed as withdrawn with liberty as prayed, keeping all contentions of the parties and objections of the Respondent (original Petitioner) open.

5. There is a delay of about 27 months (815 days) in taking out the present review petition. The delay is sought to be explained on the ground that it was the Review Petitioner's case before the appeal court that the conclusion of the Court concerning the alleged common ground was not correct; that no such contention or averment was placed before this Court. It is submitted that since, as the law stands, the appeal court did not go behind the order and deal with the particular submission, since it was based on what in fact transpired before the Company Court, the present review petition has been filed and that is how this delay has occasioned. The Review Petitioner seeks condonation of the delay.

6. Whilst I am inclined to condone the delay and allow the Review Petitioner to urge the merits of his petition, I must make one particular observation. At this juncture, i.e. more than three years after the order under review was passed, it is impossible for this Court to actually remember what was orally submitted before it. It is impossible to fathom at this point of time whether or not a contention was raised before this Court as is apparently suggested in the order, namely, that the debt arranged by the original Petitioner was to be adjusted towards the subscription amount for the warrants in terms of Clause 2.1 of the SSA. In fact, that is precisely one of the reasons why our Courts have frowned upon raising of such pleas in review petitions at distinct points of time. The Supreme Court in **State of Maharashtra vs. Ramdas Shrinivas Nayak**¹, referring to the old case of

¹ (1982) 2 Supreme Court Cases 463

Sarat Chandra Maiti vs. Bibhabati Debi², noted the following observations made in it:

“.... It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment. ...”

7. Delhi High Court in the case of **Sh. Prem Raj Chaudhry vs. Sh. Babu Ram Gupta**³ has also referred to this aspect of the matter, where a review petition was presented to the court alleging that a concession recorded in the original order was in fact not made at the original hearing. This plea was made to the court roughly after one year and eight months of the passing of the original order and in similar circumstances where the matter was carried before the appeal court and a review petition was filed raising this plea after the appeal was dismissed as withdrawn. The court noted that surely no court could humanly remember what transpired when it passed its original order; that it was for this reason only that the courts had mandated that an application for correction should be filed without any delay, referring thereafter to the observations quoted as above in the case of **Ramdas Shrinivas Nayak**.

8. As I have held above, it is impossible at this juncture to reflect on whether or not an oral plea to the effect, as suggested in the order of the Court, was made. If at all, one may only have to go by the pleadings of the parties. As far as the pleadings are concerned (and they do support a possible scenario, where Counsel would have argued accordingly), in its

² 34 Cal LJ 302 : AIR 1921 Cal 584: 66 IC 433

³ 2014 SCC OnLine Del 6786

reply to the original company petition, the Respondent Company had taken a specific stand (paragraphs 4 and 8 of the reply) that the amount of Rs.6 crores paid by the Petitioner to the Respondent was never agreed or treated as loan and that the same was to be adjusted/utilised in accordance with the terms of the SSA. The Respondent in this behalf referred to the Petitioner's own notices issued prior to the filing of the petition, by which the Respondent was called upon to "issue, allot and deliver" shares and warrants in terms of Clause 2 of the SSA on account of payment of Rs.8.70 crores made to the Respondent. Not only did the Respondent refer to this case of the Petitioner, but it went on to submit that this showed that the amount was not for debt or loan but "payment for shares and warrants" as per the SSA. This is further underscored by the Respondent at the end of paragraph 8 by submitting that the "object of the said payment was for issuance of shares and warrants in accordance with SSA". This, to my mind, shows nothing but a common ground and also amounts to an admission on the part of the Respondent Company.

9. In the premises, I cannot persuade myself to come to a conclusion that the observations made in the order under review were either contrary to the record or contrary to the submissions made across the Bar. As for the merits of what this Court has observed in its order under review, it is needless to add that these are not matters, which can be canvassed in a review petition for challenging the order under review.

10. Accordingly, there is no merit in the review petition. The review petition is dismissed.

11. In view of the dismissal of the review petition, nothing survives in the company application and the same is disposed of.

(S.C. GUPTE, J.)