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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of Decision:* 23.08.2018**

+ CO.PET. 198/2012

SINGAPORE TELECOMMUNICATIONS LTD Petitioner

Through Mr.Vikas Mehta, Mr.Aditya V.Singh
and Mr.Apporv, Advs.

versus

APM INFOTECH PVT LTD Respondent

Through Mr.Alok K.Agarwal, Mr.Apoorv
Rastogi and Ms.Aprita, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. This petition is filed under sections 433 (e) & (f), 434 (1) (a) & (c) and 439 of the Company Act, 1956 (*hereinafter referred to as the 'Act'*) seeking winding up of the respondent company.

2. The case of the petitioner is that the parties entered into two separate agreements dated 12.12.2005 being Service Request-Cum-Agreement for Corporate Voice Delivery and Service Request-Cum-Agreement for International Private Leased Circuit. It is pleaded that the petitioner commenced to provide services as per the agreements on 10.02.2006 and monthly invoices were raised on the respondent from March, 2006 onwards. It is pleaded by the petitioner that in breach of these two agreements, the respondent failed to pay invoiced amounts due under these two agreements. Hence, it is pleaded that the petitioner was constrained to terminate the

agreements by issuing a termination letter dated 20.11.2006.

3. It is further pleaded that as the agreements were governed by the laws of Republic of Singapore, the petitioner filed a recovery suit before the High Court of Republic of Singapore. Despite summons being served on the respondent, the respondent failed to appear before the High Court of Republic of Singapore. Accordingly, the High Court of Republic of Singapore delivered its judgment on 27.05.2011 directing the respondent to pay the following payments being US\$350,672.12 alongwith interest etc. Plus US\$141,010.34 and cost on indemnity bond at SG\$6,351.70. Thereafter, the petitioner has issued a notice for statutory winding up on 26.07.2011. The respondent had sent its reply on 03.08.2011 denying its contents.

4. I have heard the learned counsel for the parties.

5. The learned counsel for the petitioner has relied upon the judgment of this court in the case of *Ex.Sud Ltd. v. Indian Aluminium Cables Ltd., (2005) 1 ILR (Del) 275* to contend that on the basis of a foreign decree, a winding up petition would lie. He has also pleaded that the service was duly effected on the respondent by ordinary means before the High Court of Republic of Singapore. As per report received from the Singapore High Court, the service at the Green Park address was refused by the respondent. Subsequently, service was effected by email on the respondent at the email address provided in the record of the Registrar of Companies. Based on these, it is pleaded that the respondent was duly served.

It is further pleaded that a plea has been raised by the respondent about an FIR filed against the petitioner on the ground that services that were being provided by the petitioner in India were contrary to law. It is

pointed out that Telecom Disputes Settlement & Appellate Tribunal (TDSAT), New Delhi vide judgment dated 28.09.2012 in Petition No.444/2011, titled as ***Bharti Airtel Ltd., New Delhi v. Union of India, DoT***, has upheld the legality of the acts undertaken by the petitioner. Hence, he submits that the FIR that was registered long back against the petitioner has become redundant in view of the legal proposition settled by TDSAT.

6. The learned counsel for the respondent has made the following submissions to oppose the petition:

(i) He submits that all defences available under section 13 CPC, 1908 are also available in the present winding up petition. He submits that the respondent was not served in terms of the agreement between the parties. Hence, he submits that the foreign decree here has been obtained pursuant to proceedings which were held opposed to the principles of natural justice.

(ii) He further submits that there is a fraud played on the respondent as there was serious deficiency in the services provided by the petitioner which aspect has not been brought to the notice of the High Court of Republic of Singapore.

(iii) He further submits that the services that were being provided were illegal and contrary to the legal position as CBI has registered an FIR against the petitioner. Hence the petitioner cannot be allowed to recover the amount claimed as it is based on acts done contrary to law. It is pleaded that permitting the petitioner to recover this amount would be unsustainable as the claim is founded on a breach of law in force in India

7. I may first come to the judgment of this court in the case of ***Ex.Sud Ltd. v. Indian Aluminium Cables Ltd.***, (supra). This court held as follows:

“6. As would be clear from the respective cases of the

parties, following two questions would arise for consideration:

(a) Whether the winding up petition would be maintainable on the basis of a foreign decree? To put it differently, whether it is necessary on the part of the holder of a foreign decree to seek execution of the decree under Section 44-A of the CPC?

This assumes importance because in such an execution, when filed, the judgment debtor can contest the foreign decree on various grounds, including the grounds stated in Section 13 of the CPC. Therefore, according to the company, a foreign decree which is not automatically enforceable cannot be a basis for instituting winding up petition also as it would not be an evidence of any 'debt'.

(b) Even if it is treated that such a petition is maintainable, whether this Court can go into the question of validity of such a decree on the touchstone of Section 13 of the CPC?

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19. With respect, I am in complete agreement with the proposition of law laid down in the aforesaid judgments. Once this is to be accepted as the principle of law, the argument of learned senior counsel for the petitioner that the present petition be admitted without making any further probe, cannot be accepted. I may point out that even the Bombay High Court in the case of Silver Shield Construction and Trading Ltd.(supra) did go into the question about the validity of the decree with reference to Section 13 of the CPC. As a matter of fact, it was found that the contract between the parties in the said case, which was oral, had been arrived at in London and, therefore, the London court had jurisdiction over the matter. It was also found that the Indian company, in any case, had submitted to its jurisdiction. The court had also arrived at a finding that the London court's judgment was not ex-parte but based on merits and despite adequate opportunity afforded by the court, the Indian company had failed to avail of it and could not,

therefore, complain that judgment was opposed to natural justice. The court also rejected the contention of the Indian company that the contract on which the suit in London had been based contravened Section 27 or Section 47 of the Foreign Exchange Regulation Act. It was concluded by the court that in the absence of any valid ground for disputing the foreign judgment, it was conclusive and in these circumstances the winding up petition was admitted. As saying the law in the aforesaid perspective, questions formulated above can be answered as under:

Winding up petition filed on the basis of a foreign decree would be maintainable. It is not necessary for a decree holder, in possession of a foreign decree, to first execute the decree by filing execution and get the validity of such a decree determined on the touchstone of Section 13 of the CPC. However, it is not to say that when such a petition is filed, the court is precluded from making any further probe and proceed on the assumption that the debt is payable on the basis of the said decree. Rather, in such proceedings, it would be open to the company to show that even if it is a 'debt' the same is disputed bona fide. Debt payable under a decree can be challenged on the plea that the decree is obtained by fraud etc. As a sequittar when decree is passed by a foreign court, the judgment debtor/company will have right to demonstrate that such a decree is obtained by fraud or is not binding as it offends any of the provisos contained in Section 13 of the CPC. If the argument of learned senior counsel for the petitioner is accepted, it can have far-reaching consequences and the provision for winding up could be misused by obtaining a decree fraudulently, not getting it executed and filing winding up petition and converting it to a coercive mean of extracting money which may otherwise be not payable. Necessarily, therefore, the petitioning creditor will have to meet the challenge of the judgment debtor/company when validity of the said decree is questioned on such grounds. I may hasten to and that it is not that while examining such issue, frivolity of the respondent company is to be entertained. However, the minimum which the Company Court would be

required to do is to test the defence/submission of the company from the point of view germane to these proceedings, namely, whether the debt is disputed on bona fide grounds. In the context of a foreign decree, that would mean going into the said decree with reference to Section 13 of the CPC to find out whether only plausible defence is raised which needs examination. Otherwise, the effect would be to shut the very remedy available to such judgment debtor if execution petition is filed and it would lead to denial of natural justice.”

8. Hence, it has been settled by this court that a winding up petition would lie based on a foreign decree. However, this court has to test the foreign decree, namely, as to whether it was obtained by fraud or is not binding as it offends any of the stipulations contained in section 13 CPC. In the facts of that case this court had come to the conclusion that a valid dispute has been raised by the respondent and that the dispute was not a sham. The court had held that it would be appropriate for the petitioner to file execution proceedings under section 44-A CPC so that the validity of the decree is tested after recording the evidence and with reference to section 13 CPC.

9. Section 13 of the CPC reads as follows:

“13. When foreign judgment not conclusive:-

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except –

(a) where it has not been pronounced by a Court of competent jurisdiction;

- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [India] in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud ;
- (f) where it sustains a claim founded on a breach of any law in force in [India].”

10. It follows from the above that cases in which judgment is given without following principles of natural justice such a decree may not be conclusive as to the matter directly adjudicated upon.

11. In the present case, the judgment is *ex-parte* passed in the absence of the petitioner. The issue would be as to whether the respondent was given an adequate opportunity to appear and defend himself.

12. A perusal of the agreement between the parties shows that the correspondence address of the respondent is stated to be B-24, 25, Sector-1, Noida-210301, India. It is further stated that for clarification the contact person is Mr.Arun Maini. His e-mail addresses are arunmaini@apminfotech.com and arunmaini@rediffmail.com. Relevant portion of the agreement reads as follows:

“Section A: Particulars of Applicant

Name: APM Infotech Pvt. Ltd.

Certificate of Incorporation/Business Registration No.

Correspondence Address:

B-24-25, Sector-1, Noida-210301- India Postal Code_____

Name of the Authorised Officer of the applicant: Mr.Arun Maini

Designation Director

NRIC/Passport No.

Section B: Billing

New Account

Billing Address (if different from correspondence address)

B-24-25, Sector-1, Noida-210301- India

Postal Code:

Billing Currency: S\$ US\$ Others. Please specify

_____USD

Charge to Existing A/c No.

Billing Frequency: Monthly Quarterly.

Section C For clarification of this application Sing Tel should contact:

Name: Mr.Arun Maini

Tel/Mobile +91 9811032234

Email address: arunmaini@apminfotech.com and
arunmaini@rediffmail.com.”

13. The case of the petitioner is that a request was made of service on the respondent at the address at Noida and also at F-65, Green Park Main, New Delhi 110 016. However, as per report available, the service was sought to be effected only at F-65, Green Park Main, New Delhi and not at the Noida

address as stated in the agreement between the parties. Nazir in his report has stated that the summon was served on the servant who told that this is Mr. Arun Maini's house but he has gone out of station along with his family. Servant refused to accept the summons. It is pleaded that a request was made by High Commission Republic of Singapore to get this summons served at both addresses but the service was got effected only at Green Park address.

14. Under Order 5 Rule 15 CPC where the defendant is absent from his residence, summons may be affected on an adult member of the family on the conditions stated therein. Explanation to the said provision states that the servant is not a member of the family within the said rule. In the present case, it is manifest that an attempt was made to serve the respondent Company at a residential address of Mr. Arun Maini which service was refused by the servant present at site.

15. The Division Bench of this court in *Smt. Renu Sharma & Anr. vs. Titan Industries Ltd. & Anr.*, AIR 2007 Del. 151 (DB) held as follows:-

“14. Provisions of Order V of the Code relates to service of summons. Order V, Rule 12 of the Code enjoins that wherever it is practicable, service should be made on the person concerned unless the person has an agent empowered to accept service. Thus the requirement under law is that attempt should be made to serve notice personally on the party unless there is an agent empowered to accept service. Order V, Rules 13 and 14 of the Code relate to service of summons on an agent in certain circumstances. The said Rules, however, are not applicable to the present case. Order V, Rule 15 of the Code empowers the process server to serve summons on any adult male member of the family, if the party is found to be absent when service of summons is sought to be effected on him at his residence and there is no likelihood of the party being found at the residence

within reasonable time and he has no agent empowered to accept service. Explanation to the said rules clarifies that a servant is not regarded as a member of the family within the meaning of Order V, Rule 15 of the Code. However, while effecting service under Order V, Rule 15 of the Code, process server has to record a specific finding that the party is absent from his residence and there is no likelihood of the party being found at the residence within reasonable time. The service can be effected only on an adult member of the family of the party. Process server has therefore, to take care and caution on noting down the name and details of the adult member of the family.”

16. Clearly the manner in which the service was allegedly affected on the respondent does not prima facie inspire any confidence.

17. Further the notice by an email was also sent at vkgupta27@hotmail.com. A perusal of the additional affidavit filed by the petitioner would show that this was the email address mentioned on the official website of the Ministry of Corporate Affairs and hence the email was sent at the said address. The learned counsel for the respondent has clarified that Mr.V.K.Gupta is a Chartered Accountant of the respondent company and is not authorised to accept the summons on behalf of the respondent company.

18. I cannot help noticing that as per the agreement, the service was to be effected at “arunmaini@apminfotech.com or arunmaini@rediffmail.com.” Instead, the petitioner has chosen to serve the respondent on a completely different domain name, namely, vkgupta27@hotmail.com. Merely because the e-mail address vkgupta27@hotmail.com was the e-mail available on the website of the Ministry of Corporate Affairs of the respondent would prima facie not justify the act of the petitioner in not effecting service of notice of the suit on the e-mail address stated in the agreement between the parties.

Prima facie it appears difficult to accept service on the said e-mail ID i.e. vkgupta27@hotmail.com as due service in the absence of evidence to show that Mr.V.K.Gupta was authorised to accept summons on behalf of the respondent Company.

19. Learned counsel for the petitioner has sought to justify that the service affected at the correct address by relying upon para 7.2 and 8.1 of the agreement. In my opinion these are issues cannot be gone into in the present winding up petition.

20. The next plea raised by the respondent is that there is an FIR registered by CBI against the petitioner for providing services which are contrary to the legal provision. It is stated that Section 13 CPC provides that a foreign judgment shall be conclusive except where the foreign decree sustains a claim found on a breach of law in India.

21. The learned counsel for the petitioner has relied upon the judgment of the TDSAT to plead that the tribunal has held in favour of the petitioner stating that the services as provided are not illegal. However, the respondent was not sure about the FIR and as to whether any closure report has been filed or not.

22. A perusal of the judgment passed by TDSAT would show that the same is not passed in a case initiated by the petitioner. No doubt it may be true that the proposition of law which was laid by TDSAT may be of help to the petitioner. But again in my opinion, these are issues which would have to be dealt with by the court which may be approached by the petitioner to execute the foreign decree.

23. In my opinion, the disputes raised by the respondent are bona fide. It is appropriate that the petitioner approaches the executing court to execute

the present decree where detailed examination of the objections raised by the respondent can be gone into including by leading evidence, if necessary.

24. This petition is accordingly dismissed. I, however, grant liberty to the petitioner to approach the executing court as per law to execute the decree. It is made clear that any observation made herein are only for the purpose of adjudication of the present petition and would not in any manner prejudice the parties in case proceedings are commenced before the appropriate civil court.

JAYANT NATH, J.

AUGUST 23, 2018/v
corrected and released on 18.09.2018



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