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

+ **CO.APP. 30/2018 & CM APPL. 54351/2018**

ICRI RESEARCH PVT. LTD. .... Appellant

Through: Mr. Sunil Choudhary, Advocate.

versus

BON LON SECURITIES LTD. .... Respondent

Through: None.

**CORAM:**  
**JUSTICE S.MURALIDHAR**  
**JUSTICE SANJEEV NARULA**

% **ORDER**  
**21.12.2018**

**SANJEEV NARULA, J.:**

**CM APPL. 54350/2018 (exemption)**

1. Exemption allowed, subject to all just exceptions.

**CM APPL. 54351/2018**

2. For the reasons stated in the application, the delay in filing the appeal is condoned and the application is disposed of.

**CO.APP. 30/2018**

3. The Appellant, ICRI Research Pvt. Ltd., has filed the present Appeal under Section 483 of the Companies Act, 1956 being aggrieved by the order

dated 25<sup>th</sup> September, 2018 passed by the Company Judge wherein a Provisional Liquidator has been appointed in respect of the Appellant Company.

### **Factual Background**

4. In order to decide the present petition, it will be apposite to note certain relevant facts.

5. The Appellant is a company incorporated under the Companies Act, 1956 having its registered office in Delhi. During the normal course of business, the Respondent provided an Inter-Corporate Deposit of Rs. 50 lacs to the Appellant subject to payment of interest at the rate of 18% per annum repayable within a period of 90 days. To secure the interest of the Respondent, the Appellant executed a promissory note for Rs. 50 lacs and also a post dated cheque dated 13<sup>th</sup> September, 2008 for the aforesaid amount of Rs. 50 lacs. The Appellant also issued a cheque dated 14<sup>th</sup> June, 2008 for a sum of Rs. 1,76,202/- towards the interest that had accrued on the aforesaid loan.

6. Prior to the date of repayment, the Appellant approached the Respondent and sought extension of time for repayment of the loan amount by two months. A fresh post dated cheque dated 12<sup>th</sup> November, 2008 for the repayment of the principal amount of Rs. 50 lacs was issued by the Appellant and a cheque dated 11<sup>th</sup> September, 2008 for Rs.1,17,468/- was issued towards payment of interest (after deducting TDS). The loan amount

was not repaid and the Appellant sought further extension from the Respondent for another two months and issued a fresh cheque dated 11<sup>th</sup> January, 2009 for an amount of Rs. 50 lacs alongwith the cheque towards the payment of interest. It is noticed that the Appellant further issued cheques dated 17<sup>th</sup> January, 2009 and 2<sup>nd</sup> April, 2009 for Rs. 1,54,667/- and Rs. 67,544/- respectively towards payment of interests along with four post dated cheques of the principal amount. Three out of the four post dated cheques were encashed and as a result a balance of Rs. 15 lacs remained due. Further cheques have been issued by the Appellant Company towards the payment of interest. Finally a cheque was issued on 15<sup>th</sup> November, 2010 for an amount of Rs. 10 lacs which was encashed and as a result, an amount of Rs. 5 lacs remained due and payable by the Appellant to the Respondent.

7. Notwithstanding several reminders issued by the Respondent for repayment of the balance loan amount, the Appellant failed and neglected to clear the outstanding dues. On 8<sup>th</sup> August, 2012, the Respondent sent a communication to the Appellant. In response thereto, on 4<sup>th</sup> March, 2013, the Appellant forwarded copies of ledger accounts reflecting outstanding balance amount of Rs. 7,29,905/-, due and payable to the Respondent as on 31<sup>st</sup> March, 2013 inclusive of interest up to the said date. The accounts also reflect deductions of TDS of Rs. 18,000/-for the years 2011-12 and 2012-13.

8. On the strength of the aforesaid statement of accounts, the Respondent issued a legal notice dated 14<sup>th</sup> August, 2015 calling upon the Appellant to discharge their admitted liability of Rs.7,29,905/- along with a sum of Rs.

18,000/- towards TDS with interest @ 24% per annum w.e.f. 1<sup>st</sup> April, 2012. Despite the service of the aforesaid legal notice, the Appellant did not discharge the liability and as a consequence, the Respondent filed a petition under Section 433 (e) read with Section 434 (f) of the Companies Act, 1956 seeking winding up of the Appellant Company.

9. The learned Company Judge, after noting the submissions of the parties, admitted the petition and appointed a provisional liquidator. The operative portion of the said order reads as under:-

19. Accordingly, I admit the present petition. The Official Liquidator attached to this Court is appointed as the Provisional Liquidator. He is directed to take over all the assets, books of accounts and records of the respondent-company forthwith. The citations be, published in the Delhi editions of the newspapers 'Statesman' (English) and 'Veer Arjun' (Hindi), as well as in the Delhi-Gazette, at least 14 days prior to the next date of hearing.

20. Petitioner shall deposit a sum Rs.75,000/- towards cost of the publication with the Official Liquidator within 2 weeks, subject to any further amounts that maybe called for by the liquidator for this purpose, if required. The Official Liquidator shall also endeavour to prepare a complete inventory of all the assets of the respondent-company when the same are taken over; and the premises in which they are kept shall be sealed by him. At the same time, he may also seek the assistance of a valuer to value all assets to facilitate the process of winding up. It will also be open to the Official Liquidator to seek police help in the discharge of his duties, if he considers it appropriate to do so. The Official Liquidator to take all further steps that may be necessary in this regard to protect the premises and assets of the respondent-company. The OL will also seize all the bank accounts of the respondent.

21. However, in the interest of justice, I suspend the aforesaid order appointing the OL as the PL for a period of four weeks. In case within four weeks from today, the respondent were to pay to the petitioner the outstanding amount payable to the petitioner as reflected in their books of accounts, namely, of Rs.7,29,905/-, the aforesaid order shall stand revoked.

22. List on 08.02.2019.”

10. Aggrieved with the aforesaid order, the Appellant has filed the present Company Appeal.

11. The Court has heard the learned counsel for the Appellant.

12. Learned counsel for the Appellant argued that the learned Company Judge has erred in admitting the petition and appointing a provisional liquidator, without taking note of the fact that the claim of the Respondent was barred by limitation.

13. During the arguments, the Court had enquired if the Appellant was agreeable to deposit the disputed amount in question before the Court in order to show his *bona fide* as a condition for the Court to issue notice to the Respondent. The counsel for the Appellant stated that in so far as the present petition is concerned, since it only involves an amount of Rs.7,29,905/-, Appellant is agreeable to deposit the said amount, but he would not be in a position to do so in Company Appeal No. 31/2018 that involves an amount of Rs. 63,43,965/- and wherein a similar order has been passed against the

Appellant. We have thus proceeded to hear the submissions of the counsel and examine the legality of the orders under challenge.

14. The Company Petition by the Respondent arises out of an inability on the part of the Appellant to repay the balance amount of Rs. 7,29,905/-. This amount, according to the Respondent, was due and payable as on 31<sup>st</sup> March, 2013. The ledger accounts maintained by the Appellant reflect the aforesaid amount. The Respondent has relied upon the communication issued by the Appellant dated 4<sup>th</sup> March, 2013 enclosing therewith the copies of the books of accounts as an acknowledgment of debt/liability and the period of limitation is construed from the date of the aforesaid communication i.e. 4<sup>th</sup> March, 2013. The winding up petition has been filed within three years from the date of acknowledgment of liability/debt.

15. Learned counsel for the Appellant has strongly asserted that apart from the aforesaid communication, there is no other document on record that could show that the petition was filed within the period of limitation. He argued that the said communication is a forged and fabricated document and if the same is ignored, the debt would become time barred and the Company Petition would not be maintainable, as a time barred debt cannot be enforced under Section 433 (e) and under Sections 434 and 439 of the Companies Act, 1956. Learned counsel for the Appellant further argued that the statement of accounts is unsigned and is manipulated just to bring the claim within the period of limitation. Since there is no acknowledgment or admission on the part of the Appellant Company, the appeal for winding up was not maintainable. He relied upon the judgment passed by the coordinate

Bench of this Court in the case of *Interactive Media and Communication Solution Pvt. Ltd v. Go Airlines Ltd.* 199 ( 2013 ) DLT 267 in support of the above noted contention.

16. First and foremost, in the present case, it is significant to note that the Appellant has not denied the receipt of the legal notice issued by the Respondent prior to filing of the winding up petition. The legal notice annexed along with the Company petition is duly supported with the copies of the postal receipts, courier receipts and tracking report of the courier company evidencing the service of the said notice on the Appellant. Concededly, the Appellant did not give any reply to the said legal notice. In case the Appellant indeed had a justifiable defence, the same ought to be taken immediately on the receipt of the legal notice. The Appellant did not do so and therefore adverse influence has to be drawn against the Appellant. This Court in the case of *Kalu Ram v. Sita Ram* 1980 RLR 44, *Metropolis Travels & Resorts (I) Pvt. Ltd v. Sumit Kalra* 98(2002)DLT 573 and *Krishan Kumar Aggarwal v. Life Insurance Corporation* RFA (OS) No. 93/2010, held that with service of notice having been admitted without reservation and having not been replied to, adverse inference should be drawn against the noticee in that eventuality.

17. However, failure on the part of the Appellant to reply to the legal notice is not the only reason for this Court to decline to admit the instant appeal. We have also examined the case on merits. The Appellant does not have any cogent or plausible defence. Apart from baldly denying the liability, there is no material placed on record before the Company Court to substantiate the

stand that the Appellant had settled the loan amount and the outstanding dues. The issuance of cheques towards repayment of loan and interest is also admitted by the Appellant. The reply is evasive and vague on the merits of the claim. The Appellant has alleged that certain blank documents signed by them, have been misused by the Respondents, without explaining the context of having executed such documents. There being no cogent defence of the Appellant to deny the claim, the only question that merits consideration is as to whether the letter dated 4<sup>th</sup> March, 2013 enclosing the outstanding balance confirmation is a forged communication that would render the claim to be time barred.

18. The learned Single Judge has considered the contentions of the Appellant with respect to the documents being forged and has observed as under:-

“7. Learned counsel, for the respondent has reiterated that the balance confirmation relied upon by the petitioner are forged documents. He has also denied that such a document was sent by the respondent to the petitioner. He submits that the dues of the petitioner stood duly paid and that even otherwise, the claim of the petitioner is now barred by limitation as the dues claimed pertain to the period 2009-10 and the winding up petition has been filed in 2015. He has also denied the receipt of the notice.

8. I may firstly note that the, transactions which have been reproduced in the petition clearly show that a sum of Rs.50 lakhs was paid by the petitioner to the respondent as ICD. A perusal of the details of the post dated cheques as noted above shows that a sum of Rs. 45 lakhs was paid towards the principal amount to the petitioner leaving a balance of Rs.5 lakhs.

9. The bone of contention between the -parties is the communication dated 04.03.2013 alleged to have been sent by the respondent to the petitioner. The covering letter is on the letter head of the respondent and the covering letter is also signed by Ms.Shruti Gaur with a stamp of the respondent duly affixed on the same. The ledger accounts including ledger account for the period 01.04.2012 till 31.03.2013 also have the stamp affixed on the statement of accounts and the initials of Ms.Shruti Gaur, showing the balance amount payable to the petitioner as Rs.7,29,905/-. 10. A perusal of the reply filed by the respondent would show that other than denying having sent this communication or having executed this communication, the respondent have not further bothered to give any further information regarding their books of accounts. In para 17 of the reply, in response to para 17 of the petition, they have simply denied having sent the ledger accounts. They have also denied that any e-mail was sent to the respondent. It has been submitted that Mr. Sandeep Kumar was the accounts head of the respondent Company and is still working and no one from the respondent side ever sent this account.

11. The document filed by the petitioner is on the letter head of the respondent duly affixed with the stamp of the respondent. If the statement of account was wrong or a forged document, the respondent would have filed their own books of accounts showing that the statement of account which has been relied upon by the petitioner does not tally with the actual original books of account. No such steps have been taken. No attempt is made to support this plea by filing any documents which are manifestly in power and possession of the respondent. Best evidence that is available to the respondent has been hidden from the court. It is a settled law that where a relevant fact is withheld a presumption will arise against the person who has withheld it.”

19. We have carefully perused the documents enclosed with the appeal paper-book and considered the findings of the learned Single Judge. The

communication dated 4<sup>th</sup> March, 2013 is on the Appellant's Company letter head and also bears the rubber stamp along with the signatures of Ms. Shruti Gaur affixed on it. Learned Single Judge has also noted that in the reply there is only a bare denial of the aforesaid documents. There is no attempt on the part of the Appellant to justify the denial by producing the original ledger accounts or the copies thereof that would contradict the entries reflected in the said ledger account. Apart from saying that the statement of account is forged and fabricated, no effort has been made by the Appellant to deny the claim. Therefore, even if one were to ignore the letter dated 4<sup>th</sup> March, 2013, the statement of account reflecting the outstanding amount would have to be controverted/explained by the Appellant Company. The Appellant Company had to contradict and disprove the acknowledgment of debt not only by denying the issuance of the covering letter dated 4<sup>th</sup> March, 2013 but by producing the original ledger containing the transactions reflected in the said statement of account. The Appellant Company had the opportunity to contest the claim by producing the ledger accounts maintained by them to traverse and disclaim the entries reflected with the letter dated 4<sup>th</sup> March, 2013. Since this was not done, the learned Single Judge was justified in drawing an adverse inference against the Appellant Company on the doctrine of onus of proof. It is well settled in law that party who is having the possession of the original documents ought to take steps to produce the same.

20. We therefore find no ground to interfere with the findings of the learned Company Judge.

21. Accordingly, the appeal is dismissed with no order as to costs.

**SANJEEV NARULA, J**

**S.MURALIDHAR, J**

**DECEMBER 21, 2018**

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