

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.03.2019

Date of Decision : 06.03.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

Company Application No.331 of 2018
in
Company Petition No.288 of 2016

In the matter of the Companies Act, 1956
and
In the matter of Megasoft Limited

MEGASOFT LIMITED,
a company incorporated under
the Companies Act, 1956,
represented by its Director,
having its registered office at
No.85, Kutchery Road,
Mylapore, Chennai-600 004.

.. Applicant

Vs.

Infogix Inc.,
a company incorporated under the laws of Delaware
and having its office at
1240 E Diaehl Road, Suite 400,
Naperville, Illinois 60563
represented herein by its Constituted Attorney,
Mr.Jasjit Singh Chawla

.. Respondent

This company application is filed under Order XIV Rule 8 of Original Side Rules read with Rules 9 and 11(b) of the Company (Court) Rules, 1959 seeking to dismiss the company petition No.288 of 2016 filed by the respondent as not maintainable.

For Applicant : Mr.T.V.Sureshkumar
for M/s.Genicon & Associates

For Respondent : Mr.V.Sankara Narayanan, SC
for Mr.P.Giridharan
and Mr.Dominic S. David

ORDER

The sole respondent in the main company petition, i.e., Megasoft Limited is the lone applicant herein and the sole petitioner in the main company petition, i.e., Infogix Inc. is the sole respondent herein. Another entity of relevance for this application is Agilis International Inc. In this order, 'Megasoft Limited' shall hereinafter be referred to as 'Megasoft', 'Infogix Inc.' shall hereinafter be referred to as 'Infogix' and 'Agilis International Inc.' shall be referred to as 'Agilis' for the sake of brevity, clarity and convenience. As far as Megasoft and Infogix are concerned, wherever deemed necessary and appropriate, they shall also be referred to by their respective ranks in the main company petition for the sake of convenience and clarity.

2 If a Master Services Agreement dated 18.6.2013 between Agilis and Megasoft is the nucleus of the main company petition, i.e., C.P.No.288 of 2016, a Stock Purchase Agreement dated 03.12.2013 between Agilis and Infogix is the epicentre of this application. This stock purchase agreement can also be described as eye of the storm qua this application. Before I advert to the threefold attack on which this application is

predicated and pivoted, it may be necessary to set out a thumbnail sketch of

factual matrix (sans unnecessary details and particulars) for the purpose of appreciating this order.

3 As mentioned supra, the Master Services Agreement dated 18.6.2013 between Agilis and Megasoftware is the nucleus of the main company petition. Megasoftware is engaged in the business of software product development, primarily in the Telecom domain. Agilis entered into the aforesaid Master Services Agreement with Megasoftware for provision of certain services regarding certain software solutions and the nature of work for which services of Agilis was commissioned under this Master Services Agreement has been set out by way of an Annexure to the Master Services Agreement and the Annexure is captioned 'Statement of work'. Considering the narrow compass in which this application turns, it is not necessary to delve into those details. Suffice to say that according to Agilis, it had provided services adumbrated in the aforesaid Statement of Work to Megasoftware and had inter-alia raised three invoices totalling 269,250 US Dollars ('USD' for brevity), but this money remains unpaid.

4 Complaining that the aforesaid sum of over 2.69 lakhs USD remains unpaid, resulting in Megasoftware being indebted in a sum exceeding a lakh of rupees and further alleging that the aforesaid sum remains unpaid for more than three weeks in spite of a notice being delivered to Megasoftware, Infogix filed the main company petition inter-alia under Sections 433(e), 433(f), 434(1) and 439 of the Companies Act, 1956 (hereinafter 'said

Act' for brevity) read with Rule 95 of the Company (Court) Rules, 1959 (hereinafter 'said Rules' for brevity) with prayers for winding up Megasoft, appointment of an Official Liquidator attached to this Court as Liquidator for Megasoft and for costs, besides the usual residuary limb of a prayer on the basis of a Stock Purchase Agreement dated 03.12.2013 vide which according to Infogix, it has stepped into the shoes of Agilis. This is disputed by Megasoft. In other words, according to Megasoft, Infogix has not become a creditor qua Megasoft and the stock purchase agreement dated 03.12.2013 does not confer any right on Infogix to file the main company petition. Dismissal of the main company petition inter-alia under Rule 9 of the said Rules is sought for in the instant application on this ground. In this context, to be noted, I have referred to the stock purchase agreement as the epicentre of this application.

5 In a nutshell, according to Infogix, it has stepped into the shoes of Agilis in and by virtue of the aforesaid stock purchase agreement dated 03.12.2013 (notwithstanding Agilis continuing to exist), Infogix is legally entitled to file the creditor's winding up petition is its further say, whereas Megasoft contends that Infogix is neither a creditor nor an assignee qua Megasoft under Section 434(1) of the said Act.

6 It emerges clearly from the aforesaid narrative that this application turns on a very narrow compass as mentioned supra.

7 Instant application, i.e., C.A.No.331 of 2018 was filed by Megasoft on 14.3.2018 and Infogix has filed counter affidavit dated 19.04.2018 and completed pleadings.

8 Mr.T.V.Sureshkumar of M/s.Genicon & Associates (Law Firm) on behalf of Megasoft and Mr.V.Sankaranarayanan, learned Senior Advocate leading the counsel on record for Infogix were before this Court. I heard both sides.

9 Learned counsel for Megasoft referring to the aforesaid master services agreement and particularly to clause 7.5 therein captioned 'Assignment', submitted that Agilis does not have the right to sub contract, delegate, assign or otherwise transfer rights and obligations under the master services agreement without prior written consent of Megasoft and therefore, the aforesaid stock purchase agreement dated 03.12.2013 entered into between Agilis and Infogix does not bind Megasoft.

10 Clause 7.5 of Master Services Agreement captioned 'Assignment' reads as follows :

"7.5.Assignment. This Agreement and the performance contemplated hereunder are personal to Contractor and Contractor shall not have the right or ability to subcontract, delegate, assign or otherwise transfer any rights or obligations under this Agreement without the prior written consent of Megasoft Ltd. Any attempt to do otherwise shall be void and of no effect. Megasoft Ltd. may transfer this

Agreement un-amended, without the consent of Contractor. This Agreement will be binding upon, and inure to the benefit of the successors, representatives and permitted assigns of the parties.”

11 It was also argued on behalf of Megasoft that the expression 'a creditor, by assignment or otherwise' occurring in section 434(1) of the said Act means that Infogix should either be a creditor or an assignee. Infogix being neither a creditor nor a assignee qua Megasoft cannot maintain the main company petition for winding up is the argument on which instant application is predicated. According to learned counsel for Megasoft, Agilis is still alive as an entity even post stock purchase agreement and therefore, when Agilis is still alive, Infogix cannot maintain the instant company petition.

12 I now proceed to examine the aforesaid three arguments / points raised on behalf of Megasoft. A close perusal of Clause 7.5 of the Master Services Agreement reveals that Agilis does not have the right or ability to subcontract, delegate, assign or otherwise transfer without prior written consent of Megasoft, but what Agilis does not have is the right or ability to subcontract, delegate, assign or otherwise transfer 'this agreement and the performance contemplated hereunder' as it has been so covenanted and it has been articulated to be personal to Agilis. Though merely incidental and not directly impacting instant application, to be noted, there is no complete bar in this regard and it merely says that such assignment, transfer can be done but with the prior written consent of Megasoft. In the instant

case, there is no dispute or disagreement that the main company petition was presented in this Court on 15.7.2016 after termination of the master services agreement on 15.1.2016. This takes us to the covenant captioned 'Term and Termination' in the Master Services Agreement and the relevant clause is 4.4 captioned 'Effects of Termination'. A perusal of effects of termination adumbrated therein reveals that it has been covenanted that upon expiration or termination of master services agreement, all obligations of parties shall cease with the exception of obligations that accrued prior to the effective date of termination which shall survive and Agilis shall deliver all deliverables of Megasoft, besides, Agilis being under obligation to destroy all originals and copies belonging to Megasoft if so directed by Megasoft. After such termination on 15.1.2016, statutory notice inter-alia under Section 434(1) of the said Act was issued on 31.3.2016 followed by another demand on 17.6.2016. This position is admitted by Megasoft in the application filed in support of the instant application. Relevant portion is contained in paragraph 3 and the same reads as follows :

“3.I respectfully submit that in the statutory demand notices issued by the respondent petitioner dated 14.01.2016 and on 17.06.2016 to the applicant / respondent herein is on the ground that the Agilis International Inc is a merged entity of Infogix Inc in pursuance of the stock purchase agreements entered between the respondent corporation and the said merged former entity namely M/s.Agilis International Inc.....”

13 Therefore, the effect of stock purchase agreement dated 03.12.2013 cannot be said to be assignment of master services agreement or performance contemplated thereunder by Agilis to Infogix. To be noted, assignment of master services agreement or performance thereunder alone cannot be done without prior written consent of Megasoft. In the instant case, it is a demand made post termination, i.e., demand vide a statutory notice under said Act. Therefore, there are two reasons as to why the argument of Megasoft is unacceptable. One is, clause 7.5 captioned 'Assignment', extracted supra, stood terminated. The second reason is, it is not an assignment of agreement or performance contemplated thereunder.

14 The next point is regarding the expression 'creditor, by assignment or otherwise', occurring in sub-section (1) Clause (a) of Section 434 of the said Act. Case of Megasoft is that Infogix is neither a creditor nor an assignee qua Megasoft. The expression occurring in Section 434(1)(a) is not restricted to a creditor or assignee, but it also uses the term 'otherwise'. Hon'ble Supreme Court in **Harinagar Sugar Mills Co. Ltd. v. M.W. Pradhan**, reported in **(1966) 3 SCR 948 : AIR 1966 SC 1707** laid down the manner in which the term 'creditor' occurring in Section 434 of the said Act should be interpreted. To be noted, the term 'creditor' is not a term of art qua said Act. In other words, it is not a term which is defined in the said Act. In **Harinagar Sugar Mills Co. Ltd.** case, Supreme Court held that the expression 'otherwise' takes in any person to whom another becomes indebted howsoever the relationship of creditor and debtor is brought about between

them. Relevant paragraph is paragraph 10 in **Harinagar Sugar Mills Co. Ltd.** case and the same reads as follows :

“10..... A creditor, therefore, under the Indian Companies Act is any person who acquires that character by assignment or otherwise. The expression “otherwise” takes in any person to whom another becomes indebted howsoever the relationship of creditor and debtor is brought about between them.....”

15 To be noted, as mentioned supra, the aforesaid principle was laid down by Supreme Court in interpreting Section 434 of the said Act. Therefore, applying **Harinagar Sugar Mills Co. Ltd.** principle, it can be safely inferred that the stock purchase agreement dated 03.12.2013 certainly qualifies and neatly / snugly fits into the expression 'otherwise' occurring in Section 434(1)(a) of the said Act.

16 This takes us to the last point projected before me, i.e., Agilis is alive.

17 Referring to this argument, Mr.V.Sankaranarayanan, learned Senior Advocate drew my attention to the stock purchase agreement and submitted that it is not a case of merger or amalgamation simplicitor. It is a case where five individuals, who originally held the entire shares in Agilis, have sold the same and he drew my attention to Schedule 1.1 of Stock Purchase agreement which reads as follows :

<i>Seller</i>	<i>Company Securities</i>	<i>Company Securities Purchased by Parent</i>	<i>Company Securities Purchased by Buyer</i>	<i>Parent Shares to be Issued to Seller</i>	<i>Pro Rata Percentage</i>
Jaswinder Matharu	945	157.5	787.5	21,889	63%
Ravi Rao	480	80.0	400.0	11,118	32%
Harish Kakde	30	5.0	25.0	695	2%
Richard Miller	30	5.0	25.0	695	2%
Arun Mehta	15	2.5	12.5	347	1%
TOTALS	1,500	250.0	1250.0	34,744	100%

18 To be noted, in the aforesaid tabular column, 'company' is 'Agilis', 'parent' is the holding company of Infogix, i.e., 'Infogix Holdings, Inc.', 'buyer' is 'Infogix' and 'seller' is 'Jaswinder Matharu and four others'.

19 Therefore, it was submitted that this not being a case of merger or amalgamation simplicitor, Agilis continues to exist, but that does not denude Infogix of rights under the stock purchase agreement is his further say.

20 As I have already negated the argument that Infogix does not qualify to maintain this company petition on the ground that it had stepped into the shoes of Agilis and in the light of the fact that it neatly / snugly fits into the expression 'otherwise' by applying **Harinagar Sugar Mills Co. Ltd.** principle laid down by Supreme Court, the submission that Agilis is still alive is of no consequence.

21 Mr.V.Sankara Narayanan, learned senior counsel placed before this Court judgments of Calcutta and Bombay High Courts in

Prokash Chandra Kishenlal Vs. Kays Constructions Co. and another reported in **AIR 1962 Cal 654** and **Clicquot Asia Limited Vs. Red Robin International Ltd.** reported in **(2005) 126 Comp Cas 51 (Bom)** for principles regarding transfer of actionable claim. In the light of this Court having already held that **Harinagar Sugar Mills Co. Ltd.** case principle will apply, it is not necessary to delve into these two case laws.

22 Another Calcutta High Court judgment in **Angelo Brothers Ltd. Vs. Bennett, Coleman and Co. Ltd.** reported in **(2017) 203 Comp Cas 180 (Cal)** was pressed into service by learned Senior counsel Mr. Sankara Narayanan for the proposition that principles governing an application under Order VII Rule 11 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) would apply to the instant application as it is an application seeking dismissal of the main company petition on a preliminary / maintainability point. A perusal of **Angelo Brothers** case brings to light that as far as applications which seek dismissal of a company petition on a preliminary / maintainability point are concerned, the same should be tested on a demurrer. After saying so, it has been held that the term 'demurrer' in Indian context has been construed to have a connotation which is wider than the dictionary meaning and applications of instant nature have to be tested on a demurrer.

23 To put it differently, what follows as sequitur is, testing a petition or a plaint on a demurrer does not mean that all averments and allegations made therein are admitted as gospel truth, but it only means that prayers in the nature of instant application cannot be acceded to when a

triable issue arises. In the instant case, in the light of whether the petitioner in the main company petition is a creditor qua respondent also is a triable issue and it cannot be answered on affidavits and counter affidavits. Therefore, it is made clear that this question is not decided finally one way or the other in this order, but it is held to be a triable issue which is left open to be conclusively decided when the main company petition is tested / tried on merits. To be noted, to this limited extent, parameters and determinants governing Order VII Rule 11 of CPC applications would apply to the instant application.

24 Megasoft would do well to meet the main company petition on merits. It is asserted by learned Senior Advocate for Infogix that discharge of debt to Infogix will be discharge qua Agilis and any document required to buttress this position shall be supplied in the main company petition. This puts to rest the anxiety if any on the part of Megasoft and it also brings about a situation where Megasoft will not be put to any inconvenience, infirmity or prejudice if called upon to meet the main company petition on merits.

25 In the light of the narrative supra, the instant application is dismissed as bereft of merits. Considering the trajectory of this application, there shall be no order as to costs.

06.03.2019

Speaking order

Index : Yes

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M.SUNDAR, J.

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