IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORIGINAL JURISDICTION)

MONDAY, THE 30TH DAY OF SEPTEMBER, 2019

THE HON'BLE MR.JUSTICE S.MANIKUMAR

COMP.PETN.No.413 OF 2013

In the matter of Companies Act, 1956
and
In the matter of M/s.GR Fragrances
(India) Private Limited, No.5A,
Kilpauk Garden Road, 1st Street
Kilpauk, Chennai 600 010

M/s. Shriram City Union Finance Limited,
having its registered office at
No.123, Angappa Naicken Street,
Chennai 600 001
Rep.by its Authorised signatory
Mr.G.Ravi ...Petitioner

-vs-

M/s. GR Fragrances (India) Pvt Ltd.,
No.5A, Kilpauk Garden Road 1st Street
Kilpauk, Chennai 10 ..Respondent

This Company Petition praying that this Honble Court be pleased to:

a). The respondent Company, M/s. GR Fragrances (India) Pvt Ltd, No.5A, Kilpauk Garden Road, 1st Street, Kilpauk, Chennai 600 010, be ordered to be wound up under the directions of the Honble Court in accordance with the provisions of the Companies Act, 1956.

b). The Official Liquidator of the High Court of Madras or some other fit and proper person be appointed as liquidator of the respondent company with all powers under the Companies Act, 1956 to take charge of the assets and management of the respondent company in the course of the winding up and dispose of the assets and discharge of the liability.

c). The respondent company be directed to pay the cost of this petition to the petitioner.

This Company Petition coming on this day before this court for hearing in the presence of Mr. R.Uma Shankar for the Petitioner herein, M/s. Ahmad Associates advocate for the respondent herein, **The Court made the following order:**

This petition is filed to wind up the respondent-Company, M/s. GR Fragrances (India) Pvt. Ltd, No.5A, Kilpauk Garden Road, 1st Street, Kilpauk, Chennai - 600010, in accordance with the provisions of the Companies Act, 1956 and also sought for appointment of the Official Liquidator of the High Court of Madras or some other fit and proper person be appointed as liquidator of the respondent company with all powers under the Companies Act, 1956 to take charge of the assets and management of the respondent company in the course of winding up and dispose of the assets and discharge of the liability and costs.

2. It is the case of the petitioner that M/s.G.R.Fragrances (India) Private Limited (hereinafter referred to as "the respondent Company") was incorporated in the month of February' 2002 under

provisions of the Companies Act, 1956, having Company Identity Number (CIN) U51391TN2002PTC048491, as Private Limited Company by shares and the Registered office of the respondent Company is at Door No.5A, Kilpauk Garden Road 1st Street, Kilpauk, Chennai - 600 010. The respondent Company was established with the object of dealing with Perfumes, operating in Tamil Nadu. The nominal capital of the Company is Rs.1 Crore, divided into Rs.10 Lakhs equity shares of Rs.10 each. The issued, subscribed and paid up share capital of the company is Rs. 50,00,000/- (Rupees Fifty Lakhs) divided into 5,00,000/- equity shares of Rs.10 each as on 31.03.2010. The main object of the respondent company, as set out in the Memorandum of Understanding, inter-alia is to carry on the business as dealers in all kind of raw and finished cosmetics, perfumes, essences, dentifrices, lotions, extracts, greases, creams etc; to manufacture, but, sell, import, export and otherwise deal in cosmetics of every descriptions and kind; to carry on business as dealers in all kinds of proprietary products etc.

3.The respondent-Company approached the petitioner in the month of June 2010, with a request to extend finance facility for your working Capital and allied business activities. After repeated negotiations and discussions, the petitioner considered the request of the respondent

favorably and acceded to extend finance facility to the respondent.

Having acceded to the request of the respondent, the Director of the respondent entered into a Loan Agreement dated 10.06.2010, vide Loan Agreement No.NRTFTFH10E00368, with the petitioner. Under the said Loan agreement, a total Loan amount of Rs.30,00,000.00 was repayable with finance charges of Rs.9,51,984/- in 24 monthly installments. In other words, a sum of Rs.39,51,984/- is due and payable by the respondent in 24 monthly instalments. A sum of Rs.1,64,666/- is payable under each instalments. The first installment commenced on 10.07.2010 and the last installment end on 10.06.2012. The pattern of payment and other details of the payment are set out in the schedule to the agreement. Under the loan agreement, the respondent company agreed that in the event of any delay in payment of the loan installments or any other amount due and payable to the petitioner under the said agreement, the respondent would be liable to pay to the petitioner the delayed payment charges @ 36% p.a. from the due date till the date of payment of such amount due.

4.The respondent company also executed a Demand Promissory Note, dated 10.06.2010 in favour of the petitioner promising to pay the petitioner or its order at its office situate at No.123, Angappa Naicken Street, Chennai - 600 001, or wherever else demanded, notwithstanding

non-payment, a sum of Rs.30 lakhs together with the interest with monthly rests till date of payment in full for value received. In consideration of extending loan facility to the respondent, the Director of the respondent company, Mr.Abdul Rahim and Mrs.Fatima Rahim joined as co-borrowers guaranteeing the due performance of the obligations under the contract by the respondent. The respondent shall pay the amount due under the respective instalments on due dates mentioned in the Schedule to the said agreement, whether previously demanded or not.

5.However, contrary to the terms of the agreement, the respondent company, after paying the first 19 instalments that too irregularly and with considerable delay, committed default from the 20th installment, which fell due on 10.02.2012. The respondent company and the co-borrowers have not paid any amount despite repeated demands made by the petitioner. According to the petitioner, some of the cheques issued by the respondent towards the repayment of loan installments, were returned unpaid by its banker, when presented for collection. In view of the same, the respondent also became liable to pay cheque bouncing and other charges to the petitioner. Hence as on 28.10.2013, a sum of Rs.13,54,890/- was due and payable by the respondent. In spite of repeated requests and reminders, the respondent company failed and neglected to pay the amount remaining outstanding and due. As already

stated, the Loan agreement is dated 10.06.2010 and the agreement is for a period of 24 months. The agreement expired by efflux of time. In spite of the expiry of the agreement period (the agreement expired on 10.06.2012), the respondent company has not taken any steps to pay the amount remaining due and payable under the loan facility availed of from the applicant.

6.Since the respondent has not paid any amount despite repeated demands, the petitioner issued a notice, dated 02.01.2013, caused to be served on the respondent and the co-borrowers, calling upon them to settle the contract. Even after the said notice, the respondent neither settled the contract nor paid any amount to the petitioner and remains as a defaulter. Under the loan agreement, in the event of default in payment of the amount due under the contract, the petitioner in the event of failure to pay the amount by the respondent even after due notice, without prejudice to its other rights, is empowered and entitled to enforce the Security created by the respondent and to sell the secured assets and to adjust the sale proceeds towards the amount due under the contract. However in view of the fact that the loan advanced by the petitioner to the respondent is for Working Capital of the respondent company, the said loan is neither secured by hypothecation of machineries or by mortgage of any immovable properties and according to the petitioner, his claim is unsecured. Since the respondent or the co-borrowers have not paid any amount despite repeated demands made by the petitioner, as on 28.10.2013, a sum of Rs.13,54,890/- is due and payable by the respondent.

7.The petitioner has further submitted that since the default persists, they issued a statutory notice, dated 02.01.2013, calling upon the respondent to settle the contract. The petitioner further informed that in case of failure to settle the contract, the petitioner would initiate appropriate proceedings for winding up of the respondent company. Though the respondent acknowledged the said notice, they have neither paid any amount nor replied for the said notice. In view of the fact that the respondent has not paid any amount despite acknowledging the statutory notice, it is deemed that the respondent is unable to pay its debts and therefore, the petitioner has filed this petition for winding up of the respondent Company.

8.According to the petitioner, the respondent has lastly filed profit and loss account and Balance sheet for the financial year 2009 - 2010 with the Registrar of the Companies, Chennai. But for the assessment years subsequent to 2010, the respondent company has not filed the balance sheet before the Registrar of Companies under the provisions of the Companies Act, 1956. Liability of the respondent company for the past few years was sharply increasing and during the financial year 2008-

2009, the liability of the respondent company for the secured Loan was indicated at Rs.7.48 Crores and during the financial year 2009-2010, it has shot up to Rs.7.98 Crores. As against the liability, the respondent company does not disclose any substantial assets. On analysis, the petitioner has found that the respondent company has far exceeded its income and therefore, they apprehended that the directors of the respondent-company are siphoning of the amounts, thereby depriving the creditors and members of their legitimate dues and if the same is allowed to continue, the respondent-company will not have any source to repay its debts.

9.Though the respondent Company has acknowledged the statutory notice, it has not disputed its liability under the agreement, entered into, with the petitioner. Since the company is unable to pay the amount, it becomes commercially insolvent and therefore, the petitioner is left with no other option, but to file this petition for winding up. Further the non-compliance with the statutory notice, after the expiry of the period of 3 weeks, would also show that the respondent is unable to pay its debts. The petitioner has not received any notice, either from the company or from B.I.F.R about any reference by the company. Further, the balance sheet pertains to the respondent company for the year 2009-2010, filed

with the Registrar of Companies shows that the assets of the respondent company is much less than the liabilities of the respondent. Further, the respondent company has been desisting payment of the loan amount to the petitioner in spite of demands and this is an indication that the respondent company is unable to pay its debts.

10. The petitioner is an unsecured creditor. There is no security either by way of hypothecation or pledge of movables properties or mortgage of immovable properties offered by the Directors who all are joined as co-borrowers with the respondent company. The fact that the cheques issued by the respondent company were dishonoured consistently goes to show that the respondent company is unable to pay its debts and prayed to wind up the respondent-Company, in accordance with the provisions of the Companies Act, 1956, which is in the interest of the creditors, especially the unsecured creditors that respondent Company be not allowed to carry on its business. Official liquidator of this Court or some other fit and proper person be appointed as a liquidator for the respondent company to take charge of the assets of the respondent company.

11. Per contra, the respondent-Company has filed a detailed counter affidavit and contended that the petitioner company sanctioned Enterprise Finance Loan, to the respondent company. The petitioner

company did not disclose the percentage of interest to be charged on the said loan. The respondent company availed the said loan from the petitioner, payable in 24 monthly installments of Rs. 1,64,666/- (Rupees One Lakh Sixty Four thousand six hundred and sixty six only) . The petitioner charged a sum of Rs.9,51,984/- (Rupees Nine Lakhs fifty one thousand nine hundred and eighty four only) as interest on the loan. The petitioner charged interest for the above loan at 28% per annum. The said interest charged by the petitioner is usurious and exorbitant, which is against the provisions of the Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003, which prohibits any person including the finance companies from charging interest at a rate above 12% p.a, in the case of unsecured loan. As the sanction letter issued by the petitioner did not mention the rate of interest the respondent company could not ascertain, at the time of obtaining of the loan, as to whether the petitioner adhered to the prohibitory provisions of the Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003. As per the said Act, the petitioner company is entitled to charge a sum of Rs.3,28,109/- only but the petitioner has included a sum of Rs.9,51,984/- (Rupees Nine Lakhs fifty one thousand nine hundred and eighty four only), towards interest, in the total repayment installments.

12. The respondent-Company has further submitted that they

issued 24 cheques to the petitioner for the repayment of the monthly installments and nine out of the said cheques had been promptly realised by the petitioner and some of the said cheques had been returned unpaid by the respondent's bankers. The respondent company effected the payment against the returned cheques for the installments for the 10th month to 20th month, through replacement cheques and in cash. When the learned counsel of the petitioner issued the statutory notice to the respondent under Section 135 of the N.I Act, demanding payment against the returned cheque bearing No. 273255 dated 10.01.2012 and Cheque No. 273257 dated 10/03/2012, the respondent company effected the payment against the cheque No. 273255 dated 10/01/2012, through cash payment on 16/02/2012 for which payment the petitioner has duly issued the receipt.

13. The respondent-company had been demanding the reduction in the rate of interest charged by the petitioner in terms of the provisions of the Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003. The petitioner assured to reduce the rate of interest on completion of the repayment of the principal amount and the interest at the permissible rate of interest. The petitioner also promised to hand over the dishonoured cheques, in the possession of the petitioner, at the time of final settlement of the accounts. On effecting the repayment of the 20th installment, the

respondent company had totally paid a sum of Rs.32,93,320/- (Rupees

Thirty Two Lakhs Ninety Three thousand Three hundred and twenty only). With the payment of 20th installment, the repayment of the principal amount had been completed and the respondent company had paid a sum of Rs.2,93,320/-, over and above the principal amount. On completion of the payment of 20th installment the respondent company was in due of only Rs. 34,789/- (Rupees Thirty Four Thousand Three Hundred and Eighty Nine only), as per the application of the rate of interest under the Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003.

14. The respondent company has repeatedly approached the petitioner with request to complete the loan transaction by applying the legally applicable interest and return the cheques in the possession of the petitioner. But the petitioner has dragged on the finalization of the account on various pretexts and has filed the present petition without any legal right. Counsel for the petitioner issued the notice dated 02.01.2013, demanding payment against the 21st installment to 24th installment, while admitting that the payment up to 20th installments had been received by the petitioner.

15. The respondent has further submitted that they relied upon the documents which include a complaint filed by the petitioner under

section 138 of N.I. Act, involving a cheque bearing No.273253 dated

10.11.2011. The petitioner company received a replacement cheque in lieu of said cheque bearing No.273253, dated 10.11.2011 and issued a receipt dated 18.04.2012. The replacement cheque issued by the respondent company had been encashed by the petitioner. Yet the petitioner filed the above complaint under Section 138 of N.I. Act. The said complaint pending before the Learned XIII M.M. Saidapet, Chennai in C.C. No.2903 of 2012 has already been challenged by the respondent company, before this Court in Crl.O.P.No.10314 of 2013 and this Court had ordered interim stay against the proceedings before the Lower Court. Hence, the respondent-Company has prayed for dismissal of the company petition.

16. Decisions relied on by the learned counsel for the petitioner are as follows:

(a) In **M/s.Vijay Industries vs. M/s.NATL Technologies Ltd,** reported in **AIR 2009 SCC 1695**, the Hon'ble Supreme Court, at paragraph No.36, held thus:-

> "36. It is, however, of some interest to note that the Division Bench (in Mediquip Systems case [(2005) 7 SCC 42] , SCC p. 50, para 24) referred to a decision of the Madras High Court in Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd. [(1990) 3 Comp LJ 322 (Mad)] where the following principles relating to bona fide

dispute had been evolved:

"(1) If there is a dispute as regards the payment of the sum towards principal, however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between the parties is the civil court;

(2) The existence of a dispute with regard to payment of interest cannot at all be construed as existence of a bona fide dispute relegating the parties to decide such a dispute before the civil court and in such an eventuality, the Company Court itself is competent to decide such a dispute in the winding-up proceedings; and

(3) If there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing of a civil suit as well as filing of a petition for winding up of the company."

In that case also a bona fide dispute was raised by the company.

It was furthermore found that there was no general allegation or averment that the company was unable to pay its dues and other obligations in the sense of its innumerable creditors. It was in the aforementioned situation that Section 433(f) of the Companies Act was found to be not applicable."

(b) In **Sri Kalpatharu Financiers by its Partner Mr.K.Selvaraj vs. V.Natarajan**, reported in **CDJ 2012 MHC 2307**, this Court at paragraph Nos.71 to 79, held thus:-

"71. Therefore, when a loan is on the basis of a Negotiable Instrument viz., a promissory note which exceeds Rs. 10,000/-, it is not covered under the Money Lenders Act 1957.

72. In Indiabulls Financial Services Limited and Another v. Jubilee Plots and Housing private Limited and Others (supra) the learned single Judge of this Court had an occasion to deal with the provisions of the Exorbitant Interest Act 2003, Tamil Nadu money Lenders Act 1957 and has observed,

"15. As per Section 2(6) (vi) of the Tamil Nadu Money Lenders Act, 1957, an advance made on the basis of a negotiable instrument exceeding Rs. 10,000/- would not fall under the definition of loan. Therefore, a money lender, who makes advances on the basis of a negotiable instrument exceeding Rs. 10,000/- is not "a person" referred to in Section 3 of the Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003. In other words, a debtor cannot lawfully charge a person viz., a money lender with the act of exorbitant interest when the money lender advanced the loan on the basis of a negotiable instrument exceeding Rs. 10,000/-".

73. As stated earlier, the object of the Act 38 of 2003 is to prohibit the charging of exorbitant interest by any person. More particularly, it prohibits "a person" from charging more than 9% simple interest per annum for secured loan and 12% simple interest per annum for

unsecured loan advanced by him and the hourly vatti, daily vatti, meter vatti, kandhu vatti and thandal are thereby prohibited.

74. As per the provisions of the Money Lenders Act money lender is a person whose main or subsidiary occupation is a business of advancing and realising loans and an advance made on the basis of the pronote exceeding Rs. 10,000/- will not be covered by the Money Lenders Act.

75. Therefore 'a person' referred to in Section 3 of Act 38 of 2003 and the 'money lender' as referred to in Section 2(8) is not applicable to the loan transaction between two parties where the loan is on the basis of a Negotiable Instrument viz. a promissory note exceeding Rs. 10,000/-. Therefore, the provisions of these two acts are not applicable to the case on hand.

76. Admittedly, the appellant had calculated an exorbitant interest of Rs. 3.30 per hundred per month. Whether he comes under the Money Lenders Act or under the Tamil Nadu Prohibition of Charging Exorbitant Interest Act 2003 or not, he is not entitled for such an high rate of interest. However, the appellants have filed a Memo of calculation calculating interest at 24% p.a. and after giving credit to various amount paid by the respondent the amount payable as on date of filing of the plaint is Rs. 85,43,166.67. However, the appellant has further calculated the interest from the date of plaint till the date of decree a sum of Rs. 47,76,000/- and arrived at a grand total of Rs. 1,33,19,166.67. In the plaint, a sum of Rs. 1,01,19,065/- has

been claimed with further interest on the same amount at 24% p.a.

77. The appellant is entitled for interest on the principal viz., Rs. 40,00,000/- at 24% as the transaction is commercial, from the date of advance till the date of filing of the suit. Under Section 34 of the Civil Procedure Code this Court is at liberty to grant interest for the period, from the date of plaint till the date of decree and from the date of decree till the date of realisation.

78. Though from the date of plaint till the date of realisation, the Court can or may order 24% interest, in the present case, we are of the considered view that the plaintiff /appellant is entitled for recovery of only a sum of Rs. 85,43,166.67 as per the memo of calculation which is due from the date of execution of pronote till filing of the plaint and the plaintiff/appellant is entitled for the interest from the date of plaint till the date of decree at 12% p.a. on the decree amount of Rs. 85,43,166.67 and thereafter at 6% till the date of realisation.

79. For the reasons stated above, the appeal is allowed and the judgment and decree made in O.S. No. 552 of 2004 dated 3.3.2009 on the file of the learned I Additional District Judge, Coimbatore are set aside. The suit O.S. No. 552 of 2004 is decreed for a sum of Rs. 85,43,166.67 with interest at 12% p.a. from the date of plaint till the date of decree and thereafter at 6% till the date of realisation. No costs. M.P. No. 1 of 2009 is dismissed.

17. Decisions relied on by the learned counsel for the respondent

are as follows:

(a) In **Hind Overseas Pvt. Ltd. vs. R.P.Jhunjhunwalla**, reported in **(1976) 3 SCC 259**, the Hon'ble Supreme Court at paragraph Nos.36 and 37, held thus:-

"36. The question that is raised in this appeal is as to what is the scope of Section 433(f) of the Act. Section 433 provides for the circumstances in which a Company may be wound up by the court. There are six recipes in this section and we are concerned with the sixth, namely, that a Company may be wound up by the court if the court is of the opinion that it is just and equitable that the Company should be wound up. Section 222(f) of the English Companies Act, 1948 is in terms identical with the Indian counterpart. Section 433(f). It is now well-established that the sixth clause, namely, "just and equitable" is not to be read as being ejusdem generis with the preceding five clauses. While the five earlier clauses prescribe definite conditions to be fulfilled for the one or the other to be attracted in a given case, the just and equitable clause leaves the entire matter to the wide and wise judicial discretion of the court. The only limitations are the force and content of the words themselves, "just and equitable". Since, however, the matter cannot be left so uncertain and indefinite, the courts in England for long have developed a rule derived from the history and extent of the equity jurisdiction itself and also born out of recognition of equitable considerations generally. This is particularly so as Section 35(6) of the

English Partnership Act, 1890 also contains, inter alia, an analogous provision for the dissolution of partnership by the court. Section 44(g) of the Indian Partnership Act also contains the words “just and equitable”.

37. Section 433(f) under which this application has been made has to be read with Section 443(2) of the Act. Under the latter provision where the petition is presented on the ground that it is just and equitable that the Company should be wound up, the court may refuse to make an order of winding-up if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the Company wound up instead of pursuing that other remedy."

(b) In **IBA Health (India) Private Limited vs. Info-Drive Systems SDN. BHD**, reported in **(2010) 10 SCC 553**, the Hon'ble Supreme Court, at Paragraph Nos.20 and 33, held thus:-

"20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.

33. We may notice, so far as this case is concerned, there has been an attempt by the respondent Company to force the payment of a debt which the respondent Company knows to be in substantial dispute. A party to the dispute should not be allowed to use the threat of winding-up petition as a means of enforcing the company to pay a bona fide disputed debt. A Company Court cannot be reduced as a debt collecting agency or as a means of bringing improper pressure on the company to pay a bona fide disputed debt. Of late, we have seen several instances where the jurisdiction of the Company Court is being abused by filing winding-up petitions to pressurise the companies to pay the debts which are substantially disputed and the courts are very casual in issuing notices and ordering publication in the newspapers which may attract adverse publicity. Remember, an action may lie in appropriate court in respect of the injury to reputation caused by maliciously and unreasonably

> commencing liquidation proceedings against a company and later dismissed when a proper defence is made out on substantial grounds. A creditor's winding-up petition implies insolvency and is likely to damage the company's creditworthiness or its financial standing with its creditors or customers and even among the public."

Heard the learned counsel appearing for the parties and perused the materials available on record.

18. Respondent has been paying the installments regularly and when the cheques were issued, some were dishonoured. But the contention of the respondent that when a statutory notice, under Section 138 of the Negotiable Instruments Act, was issued, demanding payment, against the returned cheque, bearing No.273255, dated 10.01.2012 and cheque No.273257, dated 10.03.2012, the respondent company has effected payment, against Cheque No.273255, dated 10.01.2012, through cash payment on 16.02.2012, which payment has been acknowledged. Giving due consideration to the material on record and the decisions relied on by the learned counsel for the parties, this Court is not inclined to order the prayer sought for.

19. Hence, the Company Petition is dismissed. No costs.

Sd/-S.M.K.J
30.09.2019

//Certified to be true copy//
Dated at Madras this the day of 2021
R.s/10.05.2021

COURT OFFICER(O.S.)

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