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

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Date of Decision: 25.02.2019

+ CO.PET. 148/2012

KANWAL KANT CHAGTI

..... Petitioner

versus

HOTEL QUEEN ROAD PVT LTD

..... Respondent

Present: Mr.Amardeep Singh and Ms.Shruti Khosla, Advs. for the
petitioner.
Mr.Jayant K.Mehta and Mr.Harshit Agarwal, Advs. for
the respondent.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

1. This petition is filed under section 439 read with sections 433(e) and 434 of the Companies Act, 1956 seeking winding up of the respondent company. The case of the petitioner in the winding up petition is that in the year 2007 on the request of the respondent, the petitioner extended a loan to the respondent for a sum of Rs.49,07,663/-. The said payments were made vide cheques in March 2007. It is the case of the petitioner that the cheques were duly honoured and the said amounts were duly credited in the bank account of the respondent. It was also orally agreed that the respondent will pay interest @12% per annum to the petitioner from November 2007 to January 2009. Respondent company has returned part payment of

Rs.31,50,000/-. It is further pleaded that in the month of March, 2008 the respondent company issued TDS certificate to the petitioner for a sum of Rs.1,41,644/-. After making adjustment the remaining balance is of Rs.39,80,416.24 as on 03.04.2010. It is also stated that the case of the respondent company came under scrutiny with the Income Tax Department regarding assessment year 2008-2009. The Income Tax Department wrote to the petitioner and the respondent to confirm copy of transactions entered into between the petitioner and the respondent. The respondent company vide its letter dated 13.08.2010 wrote to the Income Tax Department acknowledging the part of the debt of Rs.50,16,189/- as it was then due to the petitioner. It is also stated that the respondent company filed copies of its revised ledger account containing the account of the petitioner as on 31.03.2008 and audited balance sheet also acknowledging the dues of the petitioner. It is also stated that the petitioner has filed a suit for recovery of Rs.39,80,416.24 against the respondent company in March, 2011 which is pending adjudication.

2. I have heard learned counsel for the parties. Learned counsel for the petitioner submits that payments have been made by Account Payee Cheque. He also relies upon the response of the respondent to the winding up petition where an admission is said to be made that the payments were returned by cash payment. He also relies upon a communication addressed by the respondent to the Income Tax Department where they have acknowledged the dues of the petitioner.

3. Learned counsel for the respondent has, however, strenuously pleaded that the said amount is not payable. He relies upon orders of this court to plead that the entire culprit in this matter was the former Director

Mr.R.P.Mittal who was ousted from the management of the Respondent company on 15.1.2009 in terms of the order dated 14.1.2009 of the Division Bench of this court. He states that these entries have been introduced by the said Mr.R.P.Mittal who has thereafter disappeared taking away the books of accounts and records. He submits that even for the Income Tax Returns the respondent had no option but to rely upon the records of the old management. He further states that new Management has not admitted any outstanding dues of the petitioner.

He has relied upon averments to the said effect in the two affidavits filed, namely, in March 2018 and in October 2018. He also points out that the petitioner has also filed a suit for recovery of this amount prior to filing of the winding up petition. He states that as the petitioner has filed a suit, he may be relegated to the said proceedings for recovery of its dues. He also states that the respondents have also filed a suit against Mr.R.P.Mittal and his accomplices like the petitioner for recovery of dues on account of the malfeasance and misfeasance.

4. Learned counsel for the petitioner relies upon judgment of this court in ***Bank of Nova Scotia vs. RPG Transmission Ltd., (2005) 3 Comp LJ 287 (Del)*** to contend that mere filing of a winding up petition after filing of a suit would not render the winding up petition infructuous.

5. I may note two facts which have been strongly relied upon by learned counsel for the petitioner. In paragraph 9 of the reply filed the respondent has stated as follows:-

“9. That the contents of Para 9 are wrong and denied. It is wrong and denied that the mentioned cheques have been honoured and the said amounts duly credited in the bank account of the Respondent Company and in the account books of the

Respondent Company as alleged. However the fact of the matter is that the honour of cheques in account of the company was an act devised by Mr. R.P. Mittal as an integral part of the collusive scheme, who has thereafter taken out the money from the account of the company and transferred it back to the Petitioner, thus leaving no money to be legally paid to the, Respondent 'Company by creating a liability against and also leaving the claim over the Respondent company by such transactions.

As already pleaded in the preliminary objections/submissions that the entire case of the petitioner is based upon fraud, and has been filed at instance of Mr.R.P.Mittal, therefore, the present petition deserves to be dismissed at the threshold. At this stage, it is pertinent to note that the company is a juristic person and has to act through its officers. In present case it is deliberately not mentioned by the plaintiff, as to who from the side of respondent company has orally promised the interest to them.

The amount which is being claimed by the Petitioner, as being paid towards the interest is actually an entry created by Mr. R.P. Mittal so as to suit himself and the Petitioner, whereby they could build up the story of alleged loan. At this stage it is pertinent to note that no amount had gone to the Petitioner to service interest as suggested, on the contrary, it was Mr. R.P. Mittal, who created such fraudulent entries in the books of the Respondent Company, which could give some credibility to the loan story projected by the petitioner. That the account entries relied upon by the Petitioner is only a private collusive arrangement between Mr. R.P. Mittal and the Petitioner, to the detriment of the Respondent Company, upon which no reliance could be placed.”

6. Hence, it has been pleaded that taking the money into account of the respondent company was an act devised by the former Director Mr.R.P.Mittal who has thereafter taken out the money from the account of the respondent company and transferred it back to the petitioner. It is

manifest from a reading of this submission that the payment as made by the petitioner was originally received by the respondent company.

7. Similarly, on 13.8.2010 the respondent has written to the Income Tax Officer where again they have acknowledged the outstanding dues payable by various entities including the petitioner Green Transport Corporation. Against the said company a balance of Rs.50,16,189/- is shown as a liability on 31.3.2008.

8. I may note that this court has on various dates including 24.8.2015, 28.8.2017 and 11.12.2017 issued directions to the respondent to file a clear affidavit regarding the position of payments made by the petitioner and the payments sent to the petitioner. The two affidavits have been filed as noted above on March 2018 and October 2018. In the affidavit filed in March 2018 a plea has been taken by the respondent that Mr.R.P.Mittal resorted to large scale removal of the records of the respondent company which was also recorded in CCTV Cameras. The snapshots have been annexed. Hence, it is stated that the complete record of the respondent company and its accounts for the Financial Year 2007-08 were not even audited, the new management had no option but to go by the Income Tax Return filed by Mr.R.P.Mittal without in any manner ascertaining the authenticity and genuineness of what was recorded by Mr.R.P.Mittal when he was exclusive incharge of the respondent company. Hence, essentially the plea of the respondent is that for the period in question the original records are not available and what has been filed in the Income Tax Department is only a record created by Mr.R.P.Mittal the Ex. Director.

9. As per the records available with the respondent company, they have accepted a liability of Rs.50,16,189/- in favour of the petitioner as on

31.03.2008, which is clear from the communication dated 13.08.2010 sent by the respondent company to the Income Tax Department. It is also a matter of fact that TDS certificate had been issued by the respondent company to the petitioner for the said dues. Further in their reply, the respondent company accepted that the amount relied upon by the petitioner was duly received in their account though it was claimed that the same was returned by Mr.R.P.Mittal. Clearly, prima facie amount appears due and payable to the Petitioner.

10. Regarding the plea that the suit has already been filed by the petitioner reference may be had to the judgment of this court in ***Bank of Nova Scotia vs. RPG Transmission Ltd. (supra)*** where the court framed the following issues:-

“1. In both these two appeals only one issue which is a pure question of law arises for consideration and decision of this court. The issue that is involved is whether winding up proceedings under the Companies Act could be initiated by a Bank or a Financial Institution after instituting a recovery proceeding by it under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter called 'the RDB Act').

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11. The court held as follows:-

30. Therefore, it cannot be said that RDB Act covers the field for winding up an insolvent company and, Therefore, the contentions of Mr. Tripathi are misconceived and are accordingly rejected. The contention that the petitioner could chose one of the remedies available in case where two or more than two remedies are available is applicable when the remedy provided for is one and the same but when two different remedies are provided for two different reliefs, in that event the plea of election of remedies is not

applicable. We, Therefore, hold that the winding up court is concerned with the issue as to whether or not a company could be declared as commercially insolvent and, Therefore, comes within the ambit of provisions of Section 433 of the Companies Act. The Debt Recovery Tribunal does not have any jurisdiction to entertain any such application for winding up of a company whether the same is by any bank and/or other financial institution. We also hold that both the remedies and jurisdictions are mutually exclusive of each other and, Therefore, there cannot be any inconsistency between the two different remedies provided for in two different legislations. We respectfully agree with the Division Bench decisions of Bombay and Calcutta High Court referred to above. The legal issue, which arises for our consideration is answered accordingly. The impugned order passed by the learned Single Judge on 31st of October, 2002 in CP No. 323/2001 is set aside and the entire matter is remitted back to the learned Company Judge for re-consideration and for giving a decision on the facts of the said case.”

12. Hence, the Division Bench has taken the view that mere filing of a proceeding before the DRT would not negate the right of the banks to file a petition for winding up of the respondent company. Hence, in view of the dicta of the Division Bench filing a suit prior to filing of winding up petition may not be an impediment against the petitioner in filing the present petition. By the present petition what the Petitioner seeks is to wind up the Respondent Company.

13. It is a matter of fact that the petitioner has filed a suit being CS(OS) 822/2011 against the respondent company. It is also a matter of fact that the respondent company has filed a suit being CS(OS) 161/2012 against Mr.R.P.Mittal and his associates including the petitioner.

14. Keeping in view the above, in my opinion, an opportunity should be

given to the respondent company to prove its case before a civil court. However, it is necessary to secure the claim of the petitioner. The petitioner has claimed outstanding amount in the notice sent for a sum of Rs.39,17,007/- which includes interest @ 12% per annum. There is some merit in the plea of the learned counsel for the respondent that the claim of interest is based on an alleged oral agreement between the parties and is not in any manner reflected in any written documents exchanged between the parties. Keeping in view the above facts the principal amount outstanding prima facie payable by the respondent is Rs.17,57,000/-. Let the respondent deposit a sum of Rs.20 lacs in court with the Registrar General of this court. Registry shall put the same in a Fixed Deposit. This amount would be subject to outcome of the proceedings filed by the plaintiff for recovery of its alleged dues and also the suit filed by the respondent No.1 against Mr.R.P.Mittal and the petitioner. The said payment would be deposited within six weeks from today. Needless to add that any observations made herein shall not in any manner prejudice any party in the respective suits that are pending before the Civil Court. The parties are free to raise their pleas there as per law. Trial court may adjudicate the said pleas without being influenced by any observations made herein.

15. In any case if there is a default in depositing the payment, liberty is granted to the petitioner to seek revival of this petition. Petition stands disposed of.

JAYANT NATH, J

FEBRUARY 25, 2019

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