IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30.10.2023

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

Company Application No.617 of 2022
in Company Petition No.270 of 2012

S.S.D. Oil Mills Company Ltd.,
Represented by its Director
Mr.Deepan Dorai
No.132, Village Road,
Iyyapanthangal, Chennai – 600 056 .. Applicant/Respondent

-vs-

1.Tristar Global Sdn Bhd
3-11 Block B, Phileo Damansara II,
No.15, Jalan, 16/11, Off Jalan Damansara
46350, Petaling Jaya Selangor, Malasiya
Rep. by its duly authorized Director
Mr.Divakaran Nadarajan ... Respondent / Petitioner

2.The Official Liquidator,
High Court of Madras,
Corporate Bhawan II Floor,
No.29, Rajaji Salai,
Chennai - 600 001. ... Respondents

[2nd respondent impleaded as per order dated 02.02.2023 in Comp.A.No.11 of 2023]

Prayer:

This Company Application has been preferred, under Order XIV Rule 8 of Madras High Court O.S. Rules read with Rule 6 and 9, 11(b) of Companies (Court) Rules, 1959, praying to recall the order dated 05.01.2017 passed in C.P.No.270 of 2012 and dismiss the above C.P.No.270 of 2012.

ORDER

This application has been filed by the respondent in the above Company Petition to recall the order dated 05.01.2017.

2.Earlier, this Company Petition was admitted by this Court by its order dated 01.07.2014. After the respondent had issued a legal notice dated 05.09.2012 and since the applicant herein had failed to pay the amount due in respect of supply of Crude Palm Oil covered by six invoices dated 20.09.2011 and 28.09.2011, the respondent herein had filed the above Company Petition under Section 433(e) read with Section 434(1)(a) and Section 439(1)(b)(a) of the Companies Act, 1956. This Court by its order dated 01.07.2014 ordered advertisement of Company Petition to wind up the applicant. The aforesaid order was subject matter of challenge before the Hon'ble Division Bench in OSA

No.177 of 2014. In the course of the above appeal before the Hon'ble Division Bench, a compromise was reached between the parties. The applicant had filed an affidavit undertaking to pay the amount. The relevant portion of the affidavit filed before the Hon'ble Division Bench reads as under:

> *4.I state that though the dues are that of the Company, I personally undertake to ensure the payment of the said outstanding dues of USD 21,10,000 (equivalent to Rs.12.65 Crores approx) to be paid to the Respondent as stated in the proposal set out herein. The Company and myself shall be jointly and severally liable and responsible to clear the outstanding dues to the Appellant in terms of the proposal given in this Affidavit. I am ready and willing to sell my personal property situated at 4, Valluvarkottam High Road, Nungambakkam, Chennai-600 034 ('Property') to discharge the dues of the Respondent on behalf of the Company in order to show bonafides. The further details of my Property have been stated in my previous Affidavit.*
>
> *5.I state that the Company and myself jointly and/or severally undertake to generate the sum of USD 21,10,000 dollars equivalent in Indian Rupees either by (a) selling the Property(ies) of the Company; or (b) me in my individual capacity making alternate arrangements by selling my Property to settle the outstanding dues to the Respondent for and on behalf of the Company. The Appellant Company and myself jointly and/or severally undertake to deposit the said amount into this Hon'ble Court to the credit of the Respondent in the following manner:-*

S.No	***Date (on or before)***	***Amounts (in USD Amounts will be deposited in equivalent Rupees into this Hon'ble Court***
1.	*30.09.2014*	*$ 50,000*
2.	*15.11.2014*	*$ 50,000*
3.	*31.12.2014*	*$ 10,05,000*
4.	*31.03.2015*	*$ 10,05,000*

6.The Company undertakes to make/support all applications with supporting documents for obtaining the permission required from the Reserve Bank of India for remittance of the said amount to the Respondent in USD.

7.I submit that based on the strength of this Affidavit inter-alia containing my undertaking and to enable me to give effect to the commitment stated herein above, I pray that the Hon'ble Court may grant a stay of the Order dated 01.07.2014 of the Learned Single Judge as sought for in M.P No.1 of 2014 filed along with the present Appeal and thus render justice.

3.Recording the above affidavit of the applicant, the above OSA No.177 of 2014 was disposed of by the Hon'ble Division Bench on 27.03.2014.

4.The applicant herein had however failed to pay the amount as undertaken before the Hon'ble Division Bench in their Affidavit of Undertaking dated 26.08.2014. Under these circumstances, the respondent had issued notice, asking the applicant to honour the amount. After a delay, the applicant had ended up paying Rs.5.60 Crores. After the Company Petition was ordered to be advertised by an order dated 01.07.2014 and till 14.05.2015 when the order was passed by the Hon'ble Division Bench on 27.08.2014, the applicant had paid only Rs.6 Crores. Thereafter, the applicant paid a further sum of Rs.4 Crores. After paying the aforesaid amount, since the amounts were not paid by the applicant pursuant to the affidavit filed before the Hon'ble Division Bench in OSA No.177 of 2014, this Court by an order dated 05.01.2017, had revived the order passed earlier on 01.07.2014. The operative portion of the said order dated 05.01.2017 reads as under:

> *8. In the light of the above, the order dated 1.7.2014 admitting the above company petition stands revived and the petitioner is directed to carry out the directions contained therein indicating the date of hearing as 20.02.2017.*

5.The Court had thus revived its order that was passed earlier on 01.07.2014. Under these circumstances, the order dated 05.01.2017 reviving the order passed on 01.07.2014 was taken on appeal before the Hon'ble Division Bench in OSA No.36 of 2017. The Hon'ble Division Bench by its order dated 26.07.2017 considered the fact as on that date and held as under:

> *6. As indicated by us herein above, it is quite*

obvious that while the company judge revived the order dated 01.07.2014, by which, the company petition was admitted he has, in effect, revived the company petition. Furthermore, as seen from paragraph 6 of the order of Division Bench dated 27.08.2014, the appellant was directed to deposit the money undertaken to be paid to the credit of the company petition.

6.1. We are, also, informed that since the part of the agreed amount was deposited, applications were moved by the respondent for withdrawal of sums deposited by the counsel for the appellant.

6.2. It is not disputed by the counsel for the appellant that the appellant had granted its no objection for withdrawal of moneys by the respondent.

7. Therefore, it is our opinion, while it may not have been appropriate for the learned company judge, to have treated the observations of the Division Bench in the earlier round, as a typographical error, since according to us error, if any, could have been corrected only by that bench which had passed the order there is, however, according to us, no error in reviving in effect, the company petition which resulted in resurrection of order dated 01.07.2014.

8. The other argument advanced on behalf of the appellant, which is that, since the Division Bench, vide order dated 27.08.2014, had directed the respondents to take appropriate legal action for recovery of the amount undertaken to be paid, and therefore the company petition could not have revived, according to us, is misconceived.

8.1. To our minds, the respondent had two courses open to it, upon default of the settlement by the appellant, in order to demonstrate its inability pay its debts. First, to *revive the pending company petition. Second, to file a fresh company petition. Either way the effect would be the same, as the order of the Division Bench cannot be construed as emasculating the right of the respondent to take recourse to a legal remedy provided in law. Winding up action not being stricto sensu an action for recovery of dues, it is independent of any right that the appellant may have to recover moneys owed by the appellant.*

9.Having regard to the facts and circumstances of the case, we are of the view that no interference is called for vis-a-vis the impugned judgment and order passed by the learned company Judge. Settlement, if any, can always be put forth before the learned Company Judge in the pending company petition.

10.The appeal, is accordingly, dismissed. Consequently, the interim order dated 24.02.2017, shall stand vacated. The application i.e., CMP No.3194 of 2017 shall stand dismissed.

6.The Hon'ble Division Bench has clearly held that a winding up action, *stricto sensu* is not an action for recovery of dues and the respondent has an independent right to recover money owed by the applicant herein. Thus, it was an incumbent on the part of the respondent to have filed a suit for recovery of the amount. Be that as it may, *post facto*, a notice appears to have been issued by the respondent to the applicant on 03.04.2018, wherein, the respondent has stated as follows:

Pursuant to the letter dated 14.11.2017, the

Respondent transferred a sum of Rs. 1,00,00,000/- adhoc basis to our client's account in Malaysia on 22 February 2018, through City Union Bank. In terms of the said court order the total outstanding due and payable to our client is Rs.6.06 Crores. Therefore in accordance with the Hon'ble High Court's order we request you to take possession of the assets of the company and commence liquidation of the said company at the earliest.

7.Thus, the amount that was due as on 03.04.2018 was only Rs.6.06 Crores. Meanwhile, by a communication dated 07.10.2020, the office of the Official Liquidator informed the applicant that, even after settlement of entire dues, the petitioning creditor has not withdrawn the Company Petition and the Company Petition is still with the Office of the Official Liquidator and therefore, it is opined that this case has reached a logjam due to inaction of the concerned parties. Under these circumstances, the applicant filed an application to review the order passed by the Hon'ble Division Bench earlier in OSA No.36 of 2017, dismissing the OSA filed by the applicant. The Review Application was numbered as Rev.App.No.205 of 2017. The Hon'ble Division Bench has however dismissed the same stating that there is no error apparent on the face of the records.

8.The only point for consideration is as to whether, in the light of the subsequent development that is payment of another Rs.7,06,95,102/- (Rupees

Seven Crores Six Lakhs Ninety Five Thousand and One Hundred and Two only) totalling to Rs.12,66,95,102/- (Rs.56000000/- + Rs.70695102/-), the present Company Petition is to be allowed to be continued or whether there is any merit in the stand of the respondent.

9.It is noticed that when the order was passed earlier by this Court on 01.07.2014, it was strictly in compliance with the requirement of the Company Court Rules which required advertisements to be effected by the respondent. The facts on record do not indicate that there was any stay of operation of the aforesaid order in the appeal that was filed by the applicant before the Hon'ble Division Bench in OSA No.177 of 2014. Since the applicant undertook to pay the amount in accordance with the affidavit filed before the Hon'ble Division Bench on 26.04.2014, OSA No.177 of 2014 was disposed. The Company Petition was later revived pursuant to an application filed by the respondent and an order came to be passed on 05.01.2017. *Post facto*, the applicant has paid the entire outstanding amount of Rs.12.66 Crores as mentioned above.

10.By the time, these payments were made by the petitioner to the respondent, the value of the U.S. Dollar has increased manifold time. There is a dispute as to the correct amount that is to be paid on account of the increase in the dollar value during the pendency of the proceedings. The applicant Company appears to be a going Company. However, is unable to comply with the statutory requirements on account of the pendency of the present Company Petition. The remedy that is available to the respondent is to file a suit to recover the amounts account of the increase in the dollar value between 2011 and 2019. This Company Petition cannot be kept on the file to strangulate the affairs of a going Company. This Company Petition can no longer be used as a tool to abuse the jurisdiction of the Court and covert it into an Execution Court with no decree in favour of the applicant.

11.Considering the above, this Court is inclined to allow this application with liberty to the respondent to either file a suit to recover the interest on account of the belated payment or in the alternative to consent for appointment of an Arbitrator as of their choice suggested by the applicant. Learned counsel for the respondent has declined the offer for appointment of an arbitrator. Be that as it may, there is no merits in keeping this company petition on the files of this Court. This application deserves to be allowed.

12.With the above liberty, this application stands allowed. Since the Official Liquidator was appointed by this Court as a provisional Liquidator, the amount that has been incurred by the office of the Official Liquidator is directed to be paid or adjusted out of amounts that may be available with the Liquidator. Consequently, the Company Petition stands dismissed. There shall be no order as to costs.

30.10.2023

Index : Yes/No
Internet : Yes/No
Speaking/Non-speaking
Neutral Citation : Yes/No
ssr

To

The Official Liquidator,
High Court of Madras,
Corporate Bhawan II Floor,
No.29, Rajaji Salai,
Chennai - 600 001.

C.SARAVANAN, J.

ssr

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