(2012) 09 DEL CK 0190

In the Delhi High Court

Case No : CO. Petition 321 of 2010 and CO. Application No. 1335 of 2010

Applause Entertainment Pvt. Ltd. APPELLANT

Vs

A Entertainment Pvt. Ltd. RESPONDENT

Date of Decision : 19-09-2012

Acts Referred:

Companies Act, 1956 — Section 433(e), 434
Evidence Act, 1872 — Section 114(f), 91, 92

Citation : (2012) 175 CompCas 437

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Anish Dayal and Mr. Siddharth, for the Appellant; Sandeep Aggarwal and Mr. Rajesh Pathak, for the Respondent

Judgement

Indermeet Kaur, J.—Present petition has been filed by Applause Entertainment Pvt. Ltd. (hereinafter referred to as the petitioner) seeking winding up of A. Entertainment Pvt. Ltd. (hereinafter referred to as the respondent) u/s 433(e) read with Section 434 of the Companies Act. The statutory legal notice sent at the registered office of the respondent-Company has claimed an amount of Rs. 2,26,05,872/- along with interest. The case of the petitioner is that the residential premises bearing Flat No. 101, Nisarg Building 1340-41 at Pali Hill, Bandra (West) Mumbai (said premises) had been taken on rent by the petitioner in terms of the letter dated 10.10.2005. This is a letter written by Ms. Sonia Swami, director of the respondent-Company wherein it has been admitted that the said premises have been given to the petitioner on rent for use as their guest house; the terms and conditions of this letter are contained herein and read as below:-

1. Company will pay security deposit of Rs. 2 crores (Rupees Two Crores Only)

2. Extra deposit equal to rent of 36 months

3. Monthly rent would be Rs. 1,50,000/- (Rupees One Lac Fifty Thousand Only)

4. Monthly Society Charges will be borne by you

5. Rent will be from 1st December, 2005

6. Rent is payable at the end of every month subject to applicable taxes if any This extra deposit of Rs. 54,00,000/- (Rupees Fifty Four Lac Only) will be refunded to your company by paying back Rs. 1,50,000/-(Rupees One Lac Fifty Thousand Only) monthly.

The arrangement is valid for next three years and can be terminated by giving advance notice of twelve months from either side.

2. The petitioner had deposited a sum of Rs. 2 crores with the respondent vide three cheques of Rs. 51 lacs, Rs. 1 crore and Rs. 49 lacs. The additional sum of Rs. 54 lacs (rent for 36 months at the rate of Rs. 1.50 lacs per month) had also been deposited by two cheques in the sum of Rs. 41,88,240/- and 12,11,760/-.

3. Mr. Anshumaan Swami was working as a Chief Executive Officer of the petitioner-Company w.e.f. 28.03.2002 up to 12.07.2007; he is also admittedly the director of the respondent-Company. Further case of the petitioner is that on 12.07.2007, the petitioner had handed over the said premises to the respondent and also made a request for a return of the security/deposit which it had made with the respondent; this letter had been addressed to the respondent-Company (Annexure ''D'' at page 20 of the paper book). Another letter of the same date (12.07.2007) had been addressed to Mr. Anshumaan Swami informing him that his resignation has been accepted; this is Annexure ''E'' (page 21 of the paper book). On 12.12.2008 (Annexure ''F'' page 22 of the paper book) the petitioner-Company wrote to Mr. Anshumaan Swami (as director of the respondent) informing him that the refund of the security deposit of Rs. 2,26,05,872/- in spite of reminders has not yet been received. Another letter of the same date (12.12.2008) had been written by the petitioner to the respondent requesting him to return the assets of the petitioner-Company which were lying with him which included a laptop, mobile phones and microwave oven. The receipt of this letter has not been disputed by the respondent. Respondent has however disputed the receipt of the earlier letter of the same date i.e. of 12.12.2008 (Annexure ''F'') wherein the petitioner had made a demand for the return of the security deposit; submission being that this letter had not been received by him. Pursuant to this controversy which had been raised by the respondent, petitioner-Company had been directed by this Court to furnish original proof of dispatch of the aforenoted letters as only photocopies of the courier receipts had been filed by the petitioner. In the rejoinder filed by the petitioner he has not filed the courier receipts; submission being that these documents being old the originals could not be traced but the proof of dispatch of the letters dated 12.12.2008 (dispatched on 13.12.2008) through speed post have been placed on record; they are Annexure ''C'' to the rejoinder. The presumption of service qua the dispatch of these letters by the petitioner to the respondent arises in terms of Section 114(f) of the Indian Evidence Act; it is also not the case of the

respondent that these speed post receipts are fabricated or manipulated.

4. It is in this background that the defence of the respondent has to be viewed.

5. The case of the respondent is that Mr. Anshumaan Swami was a close associate and an all time favourite of Mr. Birla; the petitioner is a Birla Group of Companies. Mr. Anshumann Swami had been appointed as a CEO of the petitioner-Company which was on a special invitation by Mr. Birla; he was issued his appointment letter dated 28.03.2002. Vehement submission of the petitioner-Company is that the terms and conditions of his appointment are contained in this appointment letter dated 28.03.2002 which nowhere spells out that he would be entitled to an accommodation. (Annexure ''A'' and Annexure ''B'' appended along with his appointment letter contained the terms and conditions of his appointment). Attention has been drawn to Annexure ''A'' (page 111 of the paper book) wherein incentives were permitted to the CEO; he would be entitled to 10% of the profits in excess of targeted profits for each financial year. Defence of the respondent being bordered on the submission that this sum of Rs. 2.5 crores had unconditionally been sanctioned to the respondent as a 10% share in his profits and this was after the success of the movie "Black" which had been released by the petitioner in the year 2005; pursuant to which Mr. Anshumaan Swami became entitled to the aforenoted incentives and this sum of Rs. 2.5 crores has been paid in this context; it was only in order to save tax that the petitioner-Company had made this proposal of routing this amount of Rs. 2.5 crores in the manner in which it has been described in the letter dated 10.10.2005; the petitioner-Company had taken the respondent''s accommodation on rent in which Mr. Anshumaan Swami was admittedly living; submission being that this amount of Rs. 2 crores was paid for this purpose alone. Further submission being that the sum of Rs. 54 lacs was the advance monthly rent which was liable to be adjusted; this amount of Rs. 54 lacs paid by the petitioner-Company was again returned back in the account of Mr. Anshumaan Swami and this is reflected adequately in the statement of account of Mr. Anshumaan Swami (Annexure ''B'' & ''C''); argument being that after the deduction of TDS from Rs. 1,50,000/- the sum of Rs. 1,16,340/- was the rent; the incoming and outgoing reverse entries reflect that this was the intent of the parties in entering in this agreement which is contained in the letter dated 10.10.2005. Submission being that this letter dated 10.10.2005 by which Rs. 2.5 crores was paid to Mr. Anshumaan Swami was obtained by the petitioner company only in order to save its tax liability.

6. The relevant extract of the statement of accounts of Mr. Anshumaan Swami has been highlighted by the learned counsel for the respondent showing the alleged entries; the enties of Rs. 3,49,020/-and of Rs. 4,50,000/- highlighted by the learned counsel for the petitioner have, however, not been able to be reconciled by him; his submission that Rs. 3,49,020/- is double the figure of Rs. 1,16,340/-(rent after deduction of TDS) is incorrect. This explanation is clearly dissatisfactory.

7. Relevant would it be to also state that there is no explanation whatsoever qua the deposit of the admitted security amount of Rs. 2.0 crores. The only defence raised by the respondent qua this security amount (admittedly received by the respondent) is that this was an unconditional payment which was made by the petitioner to the respondent in addition to the aforenoted sum of Rs. 54 lacs. How this figure of Rs. 2.54 lacs had been arrived at has not been explained or answered by the respondent in his defence. His submission is that this sum of Rs. 2.5 crores had emanated from the 10% incentive which he was entitled to in terms of his appointment letter dated 28.03.2002. Even as per this defence of the respondent from 28.03.2002 up to 10.10.2005 (when this amount of Rs. 2.54 lacs was paid) no incentives were either paid by the respondent and or even demanded by Mr. Anshumaan Swami. It is also not the defence of the respondent that the Company was not doing good business up to 2005; only submission in this regard being that after the release of the movie "Black", the petitioner-Company had made huge profits which entitled Anshumaan Swami to the aforenoted incentives figure of Rs. 2.5 crores.

8. This defence now set up by the respondent appears to be wholly illusory and moonshine; from where it has been borrowed and being totally out of context and in contrast and in conflict with the documentary evidence which is placed on record by the petitioner (all of which stand admitted by the respondent), this defence cannot be entertained by this Court. It has been raised only to ward off this winding up petition; Sections 91 and 92 of the Evidence Act mandate that where there are documents which speak, oral submissions which are to the contrary to the said documents cannot be looked into.

9. In 2009 V AD 726 titled as Indo Alusys Industries Ltd. vs. M/s Assotech Contracts (India) Ltd., a Bench of this Court had noted that where the defence appears to be bogus and sham and has been raised only in order to create a semblance of an evidence to thwart of the winding up proceedings, such a defence should not be looked into. In 2009 (151) Comp 514 Case Delhi titled as Star Cruise Management Ltd. vs. Delhi Express Travels P. Ltd., this position was reiterated.

10. No reply had also been filed by the respondent to the legal notice; the proof of the dispatch of the legal notice has been placed on record; the presumption of the receipt of the winding up notice lies in favour of the petitioner. It is only for the first time that in the reply filed to the present petition that this defence has now been set up; it has necessarily to be ignored.

11. Reliance by the learned counsel for the respondent upon the two judgments i.e. 1995 Supp. (3) SCC 650 titled as Hollyhock Pharmaceuticals Pvt. Ltd. vs. Murbad Alloy Castings Pvt. Ltd. and 101 (2002) DLT Sanjay Khanna Vs. Discovery Communications India is misplaced. In the Hollyhock Pharmaceuticals (supra) a dispute had been arisen between the landlord company and its occupant regarding repayment of the security amount; the Company Judge had directed the petitioner to establish his claim in a suit; simultaneously it had

directed the landlord to deposit a sum of Rs. 50,000/- within six weeks failing which the petition would stand admitted; it was in this background that the Apex Court had set aside the order of the Company Judge holding that where the Judge had drawn a conclusion that the controversy could be settled only by a civil suit directing the respondent company to pay Rs. 50,000/- was uncalled for; impugned order was set aside.

12. The second judgment of Sanjay Khanna (supra) is distinct on its facts; this was a case where the Single Judge of this Court had noted that where complicated questions of facts have arisen a winding up petition should not be entertained. In this case the respondent company had already released an amount of Rs. 41 lakhs which according to its defence was the only amount payable to the petitioner. There was no semblance of any admitted debt. It was in this background that the court had noted that the winding up petition should not be admitted. Facts of both the cases are distinct.

13. In this background, it is clear that the defence raised by the respondent is non-creditworthy; it is unreliable. It is in total contrast to the documents placed on record (all of which stands admitted) Admittedly, Rs. 2.54 crores had been paid by the petitioner to the respondent; Rs. 2 crores was the security deposit; Rs. 54 lacs was the advance rent at the rate of Rs. 1.50 lac per month for a period of 36 months. After adjusting the unpaid amount, balance payable was Rs. 2,26,05872/-. It has been established that this is a "debt" within the meaning of Section 434 of the Companies Act; it has been established that the respondent is unwilling and unable to pay this debt. Petition is liable to be admitted; it is accordingly admitted. However, the publication of the citation is deferred for four weeks enabling the respondent to pay this amount of Rs. 2,26,05,872/- along with interest @ 9% per annum failing which necessary steps will be taken by the petitioner to get the publication affected in "Indian Express" (English Edition) and "Jansatta" (Hindi Edition) as also in Gazette. Renotify for 02.11.2012.