

(2005) 02 DEL CK 0083

In the Delhi High Court

Case No : CP 388 of 2003

Jesse Corporation Ltd.

APPELLANT

Vs

Shivalink Services P. Ltd.

RESPONDENT

Date of Decision : 28-02-2005

Acts Referred:

Citation : (2005) 02 DEL CK 0083

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Suhail Dutt and Ujjwal Sharma, for the Appellant; P.K. Aggarwal, for the Respondent

Judgement

A.K. Sikri, J.—This petition, filed by the petitioner seeking winding-up of the respondent company (hereinafter referred to as the "company"), raises an interesting question. To state the same in nutshell here itself, the petitioner has given bank guarantee of Rs.2 crore on behalf of the company to a third party. This guarantee has not been invoked so far by the beneficiary. If invoked, the petitioner may have to pay the amount in question. However, the petitioner does not want this guarantee to continue and he has requested the company for its discharge. The company has not done so. The petitioner apprehends that it may have to pay this amount if the bank guarantee is invoked by the beneficiary in future and, Therefore, refusal of the respondent to accede to the request of the petitioner is taken as inability to pay the amount in question and present petition is filed. The respondent states that there is no debt which is crystallized or which is payable by the company to the petitioner at this stage and Therefore, this petition is not maintainable. Therefore, a question which falls for determination is as to whether there is any debt, in the given circumstances, payable by the company to the petitioner which the company is unable to pay.

2. We may now note down the facts giving rise to the aforesaid question. The petitioner is a company incorporated under the laws of Mauritius. The respondent company was incorporated under the Indian Companies Act as a private limited

company. It was incorporated in the month of March, 1998 when simultaneously or immediately thereafter a Shareholders' Agreement was entered into between Mr. Harjinder Singh and the petitioner. It is filed as Annexure "C" by the petitioner. As per this Agreement, two parties agreed to provide initial capitalisation in the respondent company as under:

4. Initial Capitalisation

4.1 Working Capital and Equipment Singh shall contribute, or cause to be contributed, to the Corporation all initial working capital and equipment for the operation of the Corporation.

4.2 Letter of Credit from Jesse Corporation. Without creating any rights, remedies, or claim in favor of or enforceable by any third party, in order to procure a class A Internet Service Provider (Class A ISP License) from the Indian government, Jesse shall provide the Corporation with a letter of credit in an amount necessary for the Corporation to procure the Class A ISP License hereinafter the (Letter of Credit). The Letter of Credit shall be used solely by the Corporation for the purpose of procuring the Class A ISP License from the government of India. In the event the Corporation is unable to procure a Class A ISP License, Jesse shall be relieved of all obligation to provide the said Letter of Credit.

As consideration for the issuance of said Letter of Credit, the Corporation shall pay to Jesse interest on the principal amounts of the Letter of Credit at the rate of 15% per annum on the amount of the Letter of Credit, payable on the monthly basis, with the first such payment to be made thirty days after issuance of the Letter of Credit.

3. Thus, Mr. Harjinder Singh was to contribute all initial working capital and equipment for the operation of the company and the petitioner was to provide the company with a Letter of Credit. This Letter of Credit was required by the respondent company to procure the Class A Internet Service Provider license (hereinafter referred to as the IPS license) from the Government of India. As a consideration for issuance of this Letter of Credit the company was to pay the petitioner on the principal amount of letter of Credit @ 15% per annum.

4. In order to give the Performance Bank Guarantee (in short the "PBG") to the Government of India for procuring the IPS license, the petitioner provided a Letter of Credit/deposit of Rs.2 crore to its bankers, Barclays Bank, Zurich, to enable the said bank to issue a counter guarantee to its Indian counterpart, the Barclay Bank for issuing a PBG for a sum of Rs.2 crore on behalf of the company in favor of the President of India through the Telegraph Authority. On the strength of this PBG, being no. BG990013 dated February 11, 1999 valid up to February 5, 2001, the Department of Telecommunication (in short the "DOT") granted the ISP license to the respondent company. This guarantee has been renewed from time to time and the petitioner has incurred expenses for renewal thereof. As per the petitioner, on such yearly renewals it has already spent an

amount of US \$ 16666 (Rs. 8 lacs approximately) plus US \$ 7500 (Rs. 3 lacs 50 thousand approximately), to save the encashment of the bank guarantee and consequent invocation of the petitioner's counter guarantee. The petitioner states that it had demanded payment of its debt by the respondent company and called upon it to make payment by serving legal notice dated February 15, 2003. However, in the reply given by the company through its Advocate claim of the petitioner was denied. Therefore, finally the petitioner served statutory notice dated April 16, 2003 of 21 days upon the company demanding the payment with threat to initiate winding up proceedings in the payment is not made. Obviously, the company did not make payment in spite of this notice which led the petitioner to file the instant petition. It may be mentioned at this stage that on the petitioner issuing the Letter of Credit, the petitioner had also issued an unconditional, irrevocable and continuing guarantee through its director Kavaljeet Singh in favor of the petitioner for punctual and prompt payment of any sums paid by the petitioner to the Government of India pursuant to the terms of the Letter of Credit together with interest @ 15% per annum and any and all legal and other costs and expenses paid or incurred by it, including the expenses incurred in extensions or renewals of the Letter of Credit. The operative portion of this guarantee reads as follows:-

1. For valuable consideration, the receipt whereof by the undersigned Nano Technologies (Pvt.) Ltd. (Borrower) is hereby acknowledged, and to Jesse Corporation (hereinafter "Lender"), to procure a letter of credit in favor of Borrower in order to secure the issuance of a Class Internet Provider License by the government of India to Nano Technologies (Pvt.) Ltd. (hereinafter referred to as the Letter of Credit), the undersigned hereby unconditionally and irrevocably guarantee(s) unto Lender, the punctual payment when due of any sums paid to the government of India pursuant to the terms of the Letter of Credit, together with interest at the rate of 15% per annum and any and all legal and other costs and expenses paid or incurred in connection therewith by the Lender (hereinafter the "Obligation"), and, in case of one or more extensions of the Letter of Credit, that the same will be promptly paid or performed when due according to each such extension or renewal. This is a continuing guarantee.

2. The undersigned further guarantee(s) that all payments made by the Borrower to the Lender or any obligation hereby guaranteed will, when made, be first and agree(s) that if any such payment is recovered from or repaid by the Lender, in whole or in part, in any bankruptcy, insolvency or similar proceeding instituted by or against the Borrower, this Guarantee shall continue to be fully applicable to such obligation to the same extent as though the payment so recovered or repaid had never been originally made on such obligation. This is a guarantee of payment and not of collection only.

5. As already mentioned above, the bank guarantee given to the DOT has not been invoked so far. Therefore, no such liability is incurred by the company for which any payment is made by the petitioner. The petitioner has simply opened

the Letter of Credit with its bank on the strength of which banks counterpart has furnished a Performance Bank Guarantee (PBG) to the DOT on behalf of the company. Even if whole of the amount representing bank guarantee or some amount is deposited by the petitioner with its bankers for this bank guarantee, the petitioner is still not out of pocket as far as this amount is concerned. It is well known that for getting the bank guarantee, the bankers may demand whole or part of the amount of bank guarantee to be deposited with it. There may be bankers lien on such an amount, but the amount remains in the name of the depositor. Therefore, the amount deposited by the petitioner with its bankers remains in the name of the petitioner, although money of the petitioner to that extent is blocked so long as the bank guarantee is alive. There may also be an apprehension that the petitioner may have to pay up the amount eventually in case the bank guarantee is invoked. However, that is not happened so far. Therefore, as far as amount of Rs. 2 crore is concerned, it cannot be said that it has been converted into any kind of "debt".

6. As no such amount is payable by the respondent to the petitioner as of today, it cannot be claimed that the respondent owes any such of Rs.2 crores to the petitioner which is covered by the Letter of Credit. In case the petitioner want the Letter of Credit/Bank Guarantee given by it to be discharged and steps be taken by the respondent company for substituting this Letter of Credit/Bank Guarantee, remedy is not to file this company petition. It lies elsewhere.

7. Having said this, we may take note of the other claims of the petitioner. The petitioner has also stated that it has incurred expenditure for providing the bank guarantee and is spending money every year on the renewals of the said bank guarantee. The amount spending so far, according to the petitioner, is US \$ 16666 (Rs.8 lacs approximately) plus US \$ 7500 (Rs.3.50 lacs approximately), the petitioner is bound to incur this expenditure and has no choice but to keep this bank guarantee alive to avoid encashment thereof. It is also claimed by the petitioner that on the amount of bank guarantee the petitioner was to be paid interest @ 15% per annum.

8. Although there is no specific clause for reimbursement of the expenses incurred on the bank guarantee, Shareholders' Agreement between the parties specifically provides for payment of interest @ 15% per annum on the amount of Letter of Credit (vide Clause 4.2). Therefore, this amount is payable by the respondent to the petitioner. In fact, respondents have no objection if the company is wound up. However, before proceeding further it is necessary to consider the version of the respondent at this stage in so far as this transaction of opening of the Letter of Credit to get the ISP license is concerned. Version of the respondent as unfolded in the reply, tells a different tale altogether and brings to the fore some startling facts.

9. It may be noted at the outset that this reply is signed by Mr. Rajesh Shah, who represents himself, Mr. Ramesh Shah as well as Mr. Rajiv Shah. According to him, the respondent company was incorporated on 27th March, 1998 in the

name of M/s. Nano Technologies Pvt. Ltd. by Mr. Kavaljeet Singh through his Chartered Accountant Mr. Ramesh Shah for the purpose of doing ISP business. The initial capital of the company was Rs.200. Two persons who subscribed shares of Rs.100/- each were Mr. Rajesh Shah and r. Rajiv Shah, nephews of Mr. Ramesh Shah. Mr. Douglas Lapin was the business partner of Mr. Kavaljeet Singh in his other business venture as well. Mr. Douglas Lapin and Mr. Kavaljeet Singh were allegedly engaged in business activities of illegal telephony. The ISP license was granted to the respondent company on 22nd March, 1999. On 16th April, 1999 there was a CBI raid in respect of another business venture, namely, Nano Tech Software Pvt. Ltd. of Mr. Kavaljeet Singh. After investigation CBI filed charge-sheet alleging that Mr. Kavaljeet Singh and Mr. Douglas Lapin in collusion and conspiracy with each other cheated the government and caused loss of Rs.9 crores through their illegal telephony business. Copy of the charge-sheet is filed with reply as "Annexure C-1". It is, inter alia, alleged in the said charge-sheet that Mr. Kavaljeet Singh was to recover a amount of Rs.2.5 crores from Mr. Douglas Lapin out of the said illegal telephony business till February/March, 1999 and instead of remitting this amount Mr. Douglas Lapin got a bank guarantee in favor of the DOT through his concern M/s. Jesse Corporation, the petitioner herein for Rs.2 crores for the grant of in ISP license.

10. As far as the respondent company is concerned, its business could not commence due to the CBI raid on 16th April, 1999. Terms of the ISP license provided that business should commence within 18 months of the grant of license, i.e. by September, 2000, failing which the bank guarantee could be invoked by the DOT. It is also alleged in the reply that to avoid invocation of the bank guarantee, Kavaljeet Singh and Douglas Lapin came together in or around May, 2000 and decided to manipulate some document to show that the business of ISP had commenced. In May, 2000 Mr. Pratap Singh, a nominee of Mr. Douglas Lapin was inducted in the board. In order to differentiate the company from Nano Tech Software Pvt. Ltd., name of the company was changed to the present name, namely, M/s. Shivalik Services Pvt. Ltd. Subsequently they wanted to surrender the ISP license and to take back the bank guarantee after some deductions. However, at this stage dispute arose between Mr. Kavaljeet Singh and Mr. Douglas Lapin.

Under these circumstances Mr. Douglas Lapin exerted pressure on Mr. Ramesh Shah as till then the capital of the company was Rs.200/- subscribed by his two nephews. When Mr. Ramesh Shah refused to interact with Mr. Douglas Lapin, he filed a criminal complaint in the Court of Mr. N.C. Gupta, Metropolitan Magistrate, Delhi. Vide order dated 2nd March, 2002, the learned Metropolitan Magistrate ordered for the registration of FIR u/s 156(3) of the Code of Criminal Procedure. Mr. Ramesh Shah and M. Rajesh Shah were arrested by the Crime Branch and their bail applications were also dismissed by the Metropolitan Magistrate. The learned Addl. Sessions Judge vide his order dated 21st June, 2002 directed Mr. Ramesh Shah and Mr. Rajesh Shah to transfer these shares in favor of Mr. Douglas Lapin or his nominee failing which the bail applications would be

dismissed. Ultimately bail was granted by this Court on 3rd October, 2002.

Thus, as per the averments made in the reply the case put forth is as under:-

A) The respondent company was incorporated by Sh. Kavaljeet Singh, although he made two nephews of Mr. Ramesh Shah as shareholders and directors. Share capital was only Rs.200/-.

B) Mr. Douglas Lapin and Mr. Kavaljeet Singh were also business partners and there was another company, namely, M/s. Nano Software Pvt. Ltd. which was doing the business of illegal Telephony and in the said business the said two persons cheated the government to the extent of Rs.9 crores.

C) Share of Mr. Kavaljeet Singh in the said business was Rs.2.5 crores which was to be paid by Mr. Douglas Lapin and instead of remitting this amount he gave bank guarantee of Rs.2 crores in favor of the DOT.

D) Although the company obtained ISP license, no such business was started by the company. Mr. Kavaljeet Singh and Mr. Douglas Lapin, however, showed on papers that such a business was started to avoid encashment of the bank guarantee and ultimate motive was to surrender the ISP license and to take back the amount of the bank guarantee. However, due to disputes between the two persons this could not happen. In the meantime, Mr. Douglas Lapin filed complaint against Mr. Ramesh Shah and Mr. Rajesh Shah with the purpose of getting the shares of the company transferred in his name.

11. It may be stated that although rejoinder is filed in which there is a stock denial of the aforesaid averments. However, the allegations are not traversed by the petitioner in detail dubbing the same as irrelevant. In any case, having regard to the FIR filed by the CBI as well as orders passed by the Courts in criminal complaint filed by Douglas Lapin, it can safely be mentioned that there are some serious allegations of fraud and illegal activities on the part of certain persons which are pending adjudication by the Criminal Courts. Entire transaction of opening of the Letter of Credit in the sum of Rs.2 crores is shrouded in mistry. In case the averment made in the reply that the company did not start any business after obtaining the ISP license is correct, it would be proper for the DOT to invoke the bank guarantee. However, it is also stated in the reply that neither Ramesh Shah nor Rajesh Shah or Rajiv Shah have any interest in the ISP license. They do not claim any right, title or interest in the said license or in the bank guarantee or in the company. It is also mentioned that the respondent is merely a Rs.200/- company. There are no assets or liabilities. It has not transacted any business at all. The alleged business done by Pratap Singh was merely for the consumption of the DOT so that the PGB is not invoked. At the time of arguments Mr. Aggarwal, learned counsel for the respondent or for that matter appearing for Ramesh Shah, Rajesh Shah or Rajiv Shah, submitted that they had no objection in case the company is ordered to be wound up, but not on the basis of averments made in the petition.

12. Having regard to these facts, including that the company is only on papers when all the parties want winding-up of the respondent company. Therefore, the company is ordered to be wound up as both the parties also intend this course of action; albeit on different grounds. The Official Liquidator attached to this Court is appointed as the Liquidator. He shall take charge of the assets and records of the company. Intimation be also sent to the Registrar of Companies for deleting the name of the company. Citations shall be published in "The Statesman" (English), "Jansatta" (Hindi) and the Delhi Gazette within two months and filed in the Court.

13. The DOT shall look into the allegations contained in the reply and if found correct, shall take steps to invoke the bank guarantee. Therefore, copy of the order be sent to the Department of Telecommunication to consider this aspect of the matter.

14. Statement of affairs shall be filed by the ex-directors of the respondent company with three weeks. If the Official Liquidator is satisfied that there are no assets and/or liabilities of the company, he shall file appropriate application u/s 481 of the Companies Act for dissolution of the company. He shall submit his report within six weeks.

15. The petition is disposed of.