

(2005) 04 DEL CK 0097

In the Delhi High Court

Case No : CP 121 of 1999

Maresh Nathani

APPELLANT

Vs

Sir Edward Dunlop Hospitals (India) Ltd.

RESPONDENT

Date of Decision : 21-04-2005

Acts Referred:

Companies Act, 1956 — Section 41, 433, 434, 439

Citation : (2006) 129 CompCas 678 : (2005) 120 DLT 214 : (2005) 82 DRJ 136 : (2005) 62 SCL 362

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

Bench : Single Bench

Advocate : Sudhir Chandra and Kavin Gulati, for the Appellant; Rajiv Nayar and Suresh Singh, for the Respondent

Judgement

A.K. Sikri, J.—The petitioner who is a Non Resident Indian residing in U.S.A., has filed this petition seeking winding up of the respondent company (hereinafter referred to as "the Company"). He had remitted a sum of US\$ 1,00,000 to the respondent company. Making of this payment by the petitioner to the respondent company is not in dispute. The petitioner states that he is entitled to receive back this amount which is a "debt" the respondent owes to the petitioner and as this liability is not discharged on spite of service of statutory notice dated 31.3.1997 u/s 433 and 434 of the Indian Companies Act, 1956, it be deemed that respondent is unable to pay the debt and, Therefore, winding up of the respondent company u/s 433, 434 and 439 of the Companies Act, 1956 is prayed for. The defense of the Company is that the amount in question was remitted as application money for allotment of equity shares of the company to the petitioner and, Therefore, there is no question of any refund of this amount to the petitioner. According to the company, the petitioner is only entitled to receive the equity shares of the company which company is still willing and ready to allot and it does not owe any "debt". It is in this back drop that the determination of real nature of transaction between the parties would decide the fate of the company petition.

2. After describing the controversy between the parties, it would be appropriate at this stage to take note of the relevant facts involving this controversy and to know as to how transaction between the parties took place.

3. As per the facts unfolded in the petition, in or about the year 1995 Mr. Shakat Singh, the Managing Director of the company met the petitioner on several occasions and also spoke to him over the telephone representing that the company was to establish 56 Super Speciality Hospitals, polyclinics and Diagnostic Centres in various cities in India and that the company was being promoted by a consortium which included the world's most known health care companies and gave certain other details of the venture including the total project cost which would be around 25 million US dollars. On these representations petitioner agreed to acquire shares worth US \$ 5 lacs initially vide his letter/fax dated 27.10.1995. The respondent company agreed to offer an equity take equivalent to US\$ 2.5 lacs. The petitioner remitted US\$ 1 lac in the account of the company with the ANZ Bank, New Delhi on 8.11.1995 which was duly acknowledged by the company through its officers vide letter/fax dated 8.11.1995. In the letter/ax dated 9.11.1995 by the respondent company, it was, however, stated that a declaration duly signed by the petitioner stating that he had no objection to the remittance of US \$ 1 lac being reflected as an interest free loan in the books of the company pending approval to be granted by the Government of India for issue of shares to Non Residents, be sent to the company. However, the petitioner did not sign this declaration and came to know that in fact the company did not have necessary clearance from the Reserve Bank of India to receive funds from a person like the petitioner as foreign equity. Thereafter the Managing Director of the company sent another fax dated 24.11.1995 asking the petitioner to make balance payment of US\$ 1.5 lacs and if the same is not received by 1.12.1995 the unpaid equity to that extent would be offered to others and the company would not obtain the consultancy services of the petitioner company for the project in question. Few months later, vide another fax dated 26.6.1996, the company through its Executive Director confirmed that the petitioner's contribution of US \$ 1 lac had been credited towards the equity share application money account and that an application form for issue of shares was being enclosed for being filled up by the petitioner. On receipt of this application form with the instructions attached thereto, it was noticed that the equity participation in the company was open only to the residents of India and the petitioner being a Non-Resident was ineligible to apply for shares offered by the company. The petitioner, Therefore, wrote letter dated 11.9.1996 to the company stating that as he did not qualify to make an application for allotment of shares as he was not a resident of India, he had decided to withdraw from the project and made a demand for return of US \$ 1 lac with appropriate interest. The company responded vide fax dated 3.10.1996 stating that the petitioner's initial remittance for issue of equity amounting to US\$ 1 lac would be refunded to the petitioner soon after the financial closure of the project which was expected to be in six months and on completing legal

formalities under the Foreign Exchange Regulation Act. However, the amount was not returned in spite of innumerable requests and reminders and ultimately statutory legal notice dated 31.3.1997 was issued under Sections 433 and 434 of the Companies Act demanding a sum of US\$ 1 lac along with an interest @ 24% per annum within a period of 21 days from the receipt of notice. This notice was replied by the company through its advocates vide letters dated 15.4.1997 and 18.4.1997. Disputes were raised to avoid payment which disputes were not bona fide. Therefore, this petition is filed seeking winding up of the respondent company alleging that disputes raised are sham and after thought.

4. In the reply filed by the respondent company, it is, inter alia, stated that the petitioner had willingly agreed to contribute equity as promoters' equity in the respondent company to the extent of US\$ 2.5 lacs to reap the benefits of profits to be generated by the respondent company as well as to secure business for itself. The petitioner had represented that, Healthcare Communications, Inc. had expertise in intra-hospital information systems, healthcare information, patient-directed educational materials, medical equipment and consumable goods and in the process the petitioner had agreed to subscribe to promoter's equity purely as venture capital, for his own benefit and gain. Thereafter, the petitioner started procrastinating the making of payment as equity. Despite having agreed to participate in promoter's equity to the extent of US \$ 2.5 lacs, the petitioner remitted US \$ 1 lac only and he failed to remit the balance payment although many reminders were sent. It is denied that petitioner was enticed by the company to invest equity as co-promoter.

5. It is also the case of the respondent company that in its books of accounts the remittance of US\$ 1 lac was received as "Equity Application Money". After inordinately awaiting for the balance equity contribution of US\$ 1.5 lac, the respondent company vide its communication of 26.6.1996 forwarded to petitioner a share application form to be filled and signed by the petitioner. However, correct form was not forwarded and inadvertently the form which was meant for Indian Residents was sent. There was form for non-residents as well which was sent subsequently by the company's counsel along with its reply dated 15.4.1997 but the petitioner did not fill up the same. Since said form is not filled up, respondent has not been able to allot the shares although it has always been ready and willing to do so. According to the company, the money in question is against allotment of shares and not a loan. Although awaiting clearance of RBI respondent had asked the petitioner to fill up the form to treat interest free loan, the petitioner himself refused to do so as he wanted to give the amount only as share application money. Therefore, there is no "debt" payable by the respondent to the petitioner and the petition is mala fide. The respondent has, in ara-10 of the reply, summed up the position as under:

i) the petitioner willingly and of his own accord after fully satisfying himself came forward to invest in equity as co-promoter;

ii) the petitioner has failed to remit the balance amount of USD 1,50,000 and

despite his failure, the respondent company is still willing to allot him shares for the amount of USD 1,00,000 remitted by him;

iii)the respondent company has been unable to allot shares due to petitioner's failure to apply and submit the requisite share application form;

iv)the respondent company was lawfully entitled to receive the remittance of USD 1,00,000 from the petitioner by way of his equity participation as a co-promoter;

v)the respondent company is still willing and ready to allot shares to the petitioner;

vi) the amount remitted by petitioner, consequent to non-allotment of shares because of petitioner's failure to submit share application form, has been credited to "Share Application Account".

6. It is also stated that the respondent is a viable and profit making company having sound financial position and, Therefore, attempt of the petitioner to recover the amount is clearly malacious.

7. At the time of arguments counsel for both the parties had highlighted the facts as set out in their respective pleadings. Facts are, by and large, in admitted domain. Factual dispute is only about the initial form sent for allotment of shares. Along with this form instructions which were sent were meant for Indian Residents only. According to the respondents, it was sent inadvertently and, Therefore, the appropriate form was sent later on by its counsel. Learned counsel for the petitioner, however argued that this was an after thought move and the second form was specifically created later and sent to the petitioner to wriggle out of the liability. This aspect I shall deal with while considering the submissions.

8. It is not in dispute that initially the money was sent by the petitioner to the respondent company for allotment of shares. The money was " application money". However, it is also not in dispute that the respondent pending clearance from RBI, wanted it to be treated as interest free loan but this declaration was not signed by the petitioner. It is clear from the record that although money was sent for allotment of shares, the company was not having necessary clearance of the RBI for remittance of such an amount by a non-resident/foreigner. It is for this reason, the company wrote letter/fax dated 9.11.1995 enclosing therewith a declaration which respondent wanted the petitioner to sign and this declaration was in the following terms:

" We have no objection to our remittance of USD 100,000 being reflected as interest free loan in the books of your company pending approval to be granted by the Government of India/Reserve Bank of India for issue shares to non-residents."

9. The company has adverted to this aspect in its reply i.e. as to when such approval was granted. When letter dated 26.6.1996 was sent, no doubt in this

letter it was mentioned that USD 1,00,000 was credited by the respondent company in the equity share application money and an application form for issue of shares was enclosed with this letter. However, the instruction contained in the application form was that " Applications may be made only by residents in India and must be for a minimum of 50 equity shares or multiples thereof". From this, the petitioner understood that the subscription of the shares was available only to Indian Residents. He accordingly wrote back on 11.9.1996 pointing out this fact and also showed his concern that no progress reports or other related communications were sent since January,1996 and, Therefore, in the light of these two factors, he wanted to withdraw from participation in this project and asked for return of his money with appropriate interest. What is crucial, and rather clinching, is the response of the company to this letter. The company's letter dated 3.10.1996, reads as following:

"Please referred to your fax dated September 11,1996.

As you have now informed us that you do not wish to take part in the equity of the project any more, your initial remittance for issuance of equity amounting to USD 100,000 will be refunded to you soon after the financial closure of the project which is expected in six months or so and on completing legal formalities under Indian Foreign Exchange Regulation Act (FERA) regulations."

10. Two aspects are, thus, apparent:

a) Significantly, the letter is conspicuously silent about the application form sent. There is not even a whisper that wrong copy of the instruction/form was sent to the petitioner and the issue was open for the non-residents as well.

b) More significantly, the company agreed to pay back the amount.

11. As this amount was not paid even after six months within which period financial closure of the project was expected, the petitioner sent through his counsel legal notice dated 31.3.1997 under Sections 433 and 434 of the Companies Act calling upon the respondent to pay aforesaid amount with interest @ 24% per annum.. It is in reply to this notice that for the first time the company came out with its version blaming the petitioner and, inter alia, stating that the petitioner was taking a complete somersault from his previous promises, assurances and repeatedly expressed eagerness to become co-promoter of the project. It was for the first time that the company came out with the plea that "while there is a prescribed form of share application by resident Indians, there is no such prescribed form of share application made by foreign investors applying for equity stake". Insofar as its earlier response dated 3.10.1996 agreeing to refund the amount is concerned, in this reply through an advocate, the company tried to wriggle out by giving the following Explanation:

"ix) On your client imploring for return of his money, being partial equity contribution on premise that, inspire of his best efforts he was unable to raise the balance equity contribution of USD 150,000, our client tentatively agreed to

return the aid contribution, subject however to grant of permission by Reserve Bank of India, compliance with provisions of Foreign Exchange Regulation Act and acceptance of refund of money by our client's Board of Directors. It was made clear to your client that the refund, if any, so permitted would be made only on financial closure of the project. Financial closure of project means the securing of all the required debt and receipt of entire promoters equity and capitalization of development and pre-operating expenses."

12. However, letter dated 3.10.1996 nowhere stated that the company had tentatively agreed to return the said contribution, subject however to grant of permission by Reserve Bank of India and acceptance by Board of Directors. It was clearly an after thought plea raised in this reply with an attempt to come out from its earlier assurance /promise to refund the amount. The somersault taken in this reply is further clear from follow up reply dated 18.4.1997 wherein another share application form was enclosed stating that it was not inadvertently enclosed with earlier reply dated 15.4.1997 and this share application form is meant for non-residents with another set of instructions. Falsity of plea taken now is clear from the following:

A. The respondent sent the application form for allotment of shares meant for Indian Residents.

B. When the petitioner pointed out that subscription of shares was meant only for Indian Residents as per the form sent, the company never, in response, pointed out that said form was sent inadvertently and there was another form meant for non-resident. On the contrary it agreed to refund the amount vide letter dated 3.10.1996.

C. In the reply dated 15.4.1997 to petitioner's legal notice also it was not stated that the form sent earlier to the petitioner was an inadvertent mistake. On the contrary the stand taken by the company was that there was no such prescribed form of share application made by foreign investors. It would be clear from the following relevant averments made in para-4(viii) in that reply:

"While there is a prescribed form of share application by resident Indians, there is no such prescribed form of share application made by foreign investors applying for equity stake."

13. Strangely, within three days thereafter another form is sent with purported Explanation that it was inadvertently not dispatched by referring to same para-4(viii).

14. That apart, as already noted above in the beginning, after the remittance of the amount respondent company had wanted the same to be treated as loan as there was no requisite clearance from the Government of India/RBI. Till date no such approval/sanction has been produced on record showing as to whether the company was able to obtain such clearance. Nothing is placed on record to show that any other foreigner was issued these shares in the said public issue.

15. It is thus clear that although money was sent by the petitioner to the company as share application money but since it could not allot the shares at that time, it itself agreed to refund the money and stated so in its letter dated 3.10.1996. Therefore, the contention of the company that a binding contract came into force between the petitioner and the company whereby the petitioner agreed to get the allotment of shares of the company would be of no avail. At the time of remittance of the amount, there was legal impediment in allotting the share. The Company itself pleaded its inability to issue the shares at that time and wanted it to be treated as interest free loan pending clearance from RBI. Thereafter, the company itself agreed to refund this amount on 3.10.1996 and requested for six months time for this purpose. Therefore, even if alleged agreement was arrived at between the parties whereby petitioner agreed to subscribe to the shares of the company, the petitioner expressed its intention to withdraw and the company also agreed to the same. Thus by mutual consent the parties rescinded the earlier arrangement. It is also clear that there were certain technical and legal hitches in the way which forced the parties to take this particular course of action. Insistence of the company now that the petitioner should get the shares allotted and is not entitled to the refund of money is clearly dishonest. It is thus clear that respondent is indebted to the petitioner in the sum of USD 100,000. Petitioner is also entitled to get interest.

16. To recapitulate, it may be stated that there is no valid application form given by the petitioner for allotment of shares; no shares allotted; in fact no permission of RBI for this purpose or even receiving the money from an NRI/ foreigner is produced and the company had agreed to refund the money. It is clear that the petitioner never became the member of the company which is possible only after the procedure laid down in Section 41 of the Companies Act is followed. In the case of Bellary Electric Supply Company Ltd. v. Kanniram Rawoothermal [1933] Comp Cas 45 the Madras High Court stated the proposition of law in the following terms:

"But apart from this aspect of the case there is ample authority for the proposition that the mere entry of a share holder's name in the company's register is insufficient to establish that an allotment of shares was in fact made. An application for shares is an offer and like any other offer must not only be accepted but the acceptance must be communicated to the person making the offer. No Indian case in point has been cited but in *In re The Universal Banking Corporation* it was held that the principles governing the formation of a contract between a company and a member of the public are identical in principle to those regulating the contractual relations between individuals. The facts in the above case are sufficiently similar to the facts in his appeal and it was held that a shareholder to whom the facts that an allotment of shares had been made had not been communicated, was not bound by any contract. The mere entry of his name on the register was held not sufficient for this purpose. We, Therefore, agree with the decision of the learned District Judge."

17. Likewise the Rangoon High Court in the case of A. Sirkar v. Parjoar Hosiery Mills Ltd. [1933] Comp Cas 454 had occasion to deal with same legal issue and stated the law in the following terms:

"It is quite clear that there can be no proper allotment of the shares binding on the petitioner unless the petitioner had been informed of the allotment. Before the petitioner is informed of the allotment of shares he has a right to revoke his offer to purchase the shares and ask for the return of the money paid for that purpose. That is quite clear from case of In re Universal Banking Co. where at p.637, Page Wood, L.J., says as follows:

" The course of decisions has determined that to obtain a binding allotment there must be an application, an allotment and a communication of the allotment."

18. Reliance of the petitioner on the judgment of Calcutta High Court in the case of K.T.S. (Singapore) PLC. Ltd. v. Associated Forest Products (Pvt.) Ltd. 1996 (85) Comp Cas 190 in support of the plea that in the absence of permission from RBI, no such transaction could take place is also well founded.

19. It is a trite law that if the company is indebted and the amount is clearly owed by the company to the petitioning creditor, such a defense that the company is a viable and profit making company having sound financial position would not be available.

20. Before I come to consequential direction, one more aspect has to be dealt with. A preliminary objection is taken by the respondent to the maintainability of such a petition. It is argued that Mr. Yogesh Gulati who has signed and filed the petition on behalf of the petitioner does not hold proper power of attorney to enable him to institute these proceedings. The objection is that there is no documentary evidence to substantiate the claim of Mr. Gulati being the constituted attorney of the petitioner. Along with the rejoinder the petitioner filed the power of attorney dated 16.7.1997 executed by the petitioner in favor of Mr. Gulati to show that he was having valid authority to file these proceedings. Para-1 of this power of attorney reads as under:

"To commence, carry on, prosecute, defend, appear or to intervene in all suits, actions, applications, references, appeal or other proceedings in any court of law now pending or which may hereafter be instituted on my behalf or against me or in which may be interested or concerned or to which I may be a party to represent me before all Courts of Civil, Criminal, Revenue or the Insolvency, Jurisdiction before all public officers or authorities, administrative, executive or revenue or before public bodies or corporations and to appoint Pleaders, Attorneys, Advocates, Mukhtears, Revenue Agents and to sign Vakalatnamas, Mukhtearnamas, Warrants of Attorney, and also to sign and verify all complaints, Written Statements, Tabular Statements, Petition Accounts Inventories , Application or other documents and papers, that may be necessary to be filed for the purpose of the said suits, actions or other proceedings and to obtain delivery from courts of law or Corporate bodies or public officers of documents, goods,

property and money and to give valid discharge thereof."

21. The respondent objected to the admissibility of this power of attorney on the ground that this was not validly stamped in India. In order to meet this objection, the petitioner has filed another power of attorney which is executed on proper stamp paper and it is also attested by Consulate General of India, New York. This power of attorney is dated 18.10.2004 and para-1 thereof confirms having given earlier power of attorney dated 16.7.97 by the petitioner to Mr. Yogesh Gulati which was duly notarized the Notary Public of New Jersey. It also mentions that the petitioner had executed a power of attorney dated 27.12.97 at New Delhi in favor of Mr. Gulati for the same purpose. Paras 2 to 5 of this power of attorney are relevant and are reproduced below:

"2. That in pursuance of the aforesaid powers given by me in favor of Mr. Yogesh Gulati, he has taken appropriate proceedings which culminated in the filing of a Company Petition No.121/1999 before the Hon"ble Delhi High Court.

3. That however, I have been informed that an objection has been taken by the respondent in the Company Petition with regard to the legality of the power of attorney.

4. That in order to avoid any dispute on this account I am Therefore, giving a fresh power of attorney to Mr. Yogesh Gulati of 11, Edmonstone Road, Allahabad, U.P. Do all such acts as may be necessary to recover money from Sir Edward Dunlop Hospitals (India) Ltd.. I also ratify and affirm all such previous acts which may have been taken by Mr. Yogesh Gulati, in this regard.

5. That I authorise my power of attorney to commence, carry on, prosecute, defend, appear or to intervene in all suits, actions, applications, references, appeal or other proceedings in any court of law now pending or which may hereafter be instituted on my behalf or against me....."

22. It is thus clear that the petitioner has confirmed that Mr. Gulati was appointed his attorney by executing attorneys dated 16th July, 1997 and 27th December, 1997. Further, in this power of attorney dated 18th October, 2004, action of Mr. Gulati having instituted this very company petition is specifically approved and ratified. Thus not only power of attorney on a valid stamp paper as per Indian Law is produced, there is a specific authorisation for instituting present proceedings as well. Therefore, the objection of the respondent that there is no specific authorisation to file a company petition is ill founded and reliance on the judgment of this court in the case of J.S. Bhalla Vs. G.J. Bhawnani, or in the case of Shantilal Khushaldas and Bros. Pvt. Ltd. Vs. Smt. Chandanbala Sughir Shah and another, shall also be of no avail. If the earlier power of attorney was not stamped as per Indian Law, it was a mere irregularity which could be cured. The Supreme Court in the case of United Bank of India Vs. Naresh Kumar and others, went to the extent of holding that such a ratification can be proved even at Appellate stage. Therefore, I do not find any force in this preliminary submission of the respondent.

23. The petition is admitted to hearing. Citations be published in 'Statesman' (English) and 'Jansatta' (Hindi) for 25th July, 2005. However, this order shall remain in abeyance for a period of six weeks. Time is granted to the respondent to deposit Rs. 50 Lakhs with the Registrar General of this Court. In case amount is not deposited within the aforesaid period the petitioner shall take steps for publication of citations. Appointment of provisional liquidator is deferred.

24. List for further orders on 25th July, 2005.