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

+ CO.PET. 435/2009

MRS. SAROJ GUPTA

Through

..... Petitioner

Mr. Shivpati B. Pandey,
Advocate

versus

M/S. KUNAL PIPES (INDIA)

PVT. LTD.

Through

..... Respondent

Ms. Maneesha Dhir with
Mr. Hemant Sharma and
Ms. Mitu Jain, Advocates

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Reserved on: 20th March, 2012.

Date of Decision: 30th March, 2012.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J :

1. Present winding up petition has been filed under Section 433(e) read with Sections 434 and 439 of the Companies Act, 1956 stating that the respondent-company is unable to pay its debt allegedly amounting to ₹ 9,10,000/- as well as interest @ 24% per annum from the date when the said amounts were advanced to the respondent-company.

2. The facts as stated in the petition are that the petitioner had advanced a loan of Rs. 9,10,000/- to respondent-company vide demand drafts/cheques, details of which are mentioned in para 7 of the petition. The said details are reproduced hereinbelow:-

Sl. No.	Date	Particular	Dr. Amount
1.	01/04/1998	DD/Cheque No. 0449409	1,50,000/-
2.	01/04/1998	DD/Cheque No. 105058	1,00,000/-
3.	14/04/1998	DD/Cheque No. 980855	1,35,000/-
4.	30/07/2000	DD/Cheque No. 002836	1,25,000/-
5.	17/08/2000	DD/Cheque No. 473290	1,25,000/-
6.	21/08/2000	DD/Cheque No. 473331	75,000/-
7.	04/11/2000	DD/Cheque No. 268345	1,00,000/-
8.	04/11/2000	Bank not known	1,00,000/-
		Total	9,10,000/-

3. Mr. Shivpati B. Pandey, learned counsel for the petitioner stated that the respondent-company had vide its letter dated 15th April, 2007 confirmed the aforesaid loan amount of Rs. 9,10,000/- as due and payable. Since considerable emphasis was laid on the said letter, the same is reproduced hereinbelow:-

“LOAN CONFIRMATION

*To
Saroj Omprakash Gupta
36/1918, Gandhi Nagar,
Service Rd. No-1, Bandra East,
Mumbai-400 051.
Maharashtra, India
PAN NO-AAFPG 5798 L*

We M/S. KUNAL PIPES (INDIA) PVT. LTD. Confirm and Certify that we have Received a Loan of Rs.910000/- (In Words Nine Lakhs Ten Thousand only) From Smt. SAROJ OMPRAKASH GUPTA, of Mumbai, (MH).

The Above Said Loan is Outstanding in our books as on 31.03.2007. So kindly bear with us.

Yours Faithfully,

FOR M/S. KUNAL PIPES (INDIA) PVT. LTD.

*Mahavir Prasad Aggarwal
DIRECTOR*

*Date: 15.04.2007
Place: DURG*

4. Mr. Pandey pointed out that in the auditor's report for the financial year 2003-2004, the petitioner's debt had been admitted. In this connection, he referred to page 201 of the paper book.

5. Mr. Pandey stated that under a Memorandum of Agreement (for short 'Agreement') dated 5th September, 2007, Mr. Sushil Kumar Tulsian and Mr. Manish Tulsian purchased majority shareholding of the respondent-company. He submitted that by virtue of the said Agreement, the new promoters had agreed to repay all liabilities and dues of the respondent-company to the banks, financial institutions as well as unsecured creditors. In this

connection, he relied upon para 12 of the Agreement, which is reproduced hereinbelow:-

“12. The Second Party shall pay the entire money by cheque in favour of the shareholders to the extent of the respective shareholding of each shareholder. The price/share will be decided on finalization of Balance sheet as at 31-03-2007. The remaining money shall be brought into the company for clearance of previous liability and dues of bank, financial institution and also for the repayment of entire Share Application Money and Unsecured Loans of the First Party in the company (as mutually agreed upon between both parties) through the company. The total consideration under no circumstances shall exceed Rs.450.00 Lacs only. Any liability over and above this amount shall be borne by the first party.”

6. On the other hand, Ms. Maneesha Dhir, learned counsel for the respondent-company contended that the alleged loan confirmation letter dated 15th April, 2007 relied upon by the petitioner was a manufactured and fabricated document, created only for the purposes of the present petition. She stated that Mr. Mahavir Prasad Aggarwal, the initial promoter of the respondent-company and one of the signatories to the Agreement dated 5th September, 2007 had declared that the balance sheet and profit and loss account prepared up to 31st March, 2007 correctly reflected the accounts of the respondent-company and there were no other assets and liabilities of the respondent-company. Ms. Dhir referred to the

balance sheet for the year ending 31st March, 2007 at page 158 of the paper book to show that it did not disclose the name of the petitioner as one of the creditors of the respondent-company. In fact, she pointed out that in the said balance sheet dated 31st March, 2007 under the heading of unsecured loans, no amount was mentioned as due and payable. Thus, according to her, the plea that the alleged loan confirmation letter dated 15th April, 2007 had been contemporaneously given by the previous director of the respondent-company, was not correct.

7. Ms. Dhir further submitted that the petition was barred by limitation as the alleged loan had been advanced during the years 1998 to 2000 whereas the present winding up petition had been filed on 12th October, 2009.

8. Ms. Dhir further submitted that even if it is accepted that the alleged loan confirmation letter dated 15th April, 2007 constituted an acknowledgement of debt, it would not help the petitioner as the said acknowledgement of liability had not been made before expiration of the limitation period. She stated that to avail the benefit of Section 18 of the Limitation Act, 1963 (for short 'Act, 1963'), petitioner

would have to show that a letter constituting an acknowledgement of debt had been issued by the respondent-company during the period of limitation. Section 18(1) of the Act, 1963 reads as under:-

“18. Effect of acknowledgment in writing.

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.”

9. Ms. Dhir relied upon a judgment of the Andhra Pradesh High Court in ***N.A. Radha & Ors. Vs. State of Andhra Pradesh & Ors., 2000(2) ALD 560*** wherein it was held as under:-

“11. There are no merits in the contention of the Corporation that the letter of the petitioners 1 and 3 dated 18-10-1988 constitutes an acknowledgment of debt. In terms of Section 18 of the Limitation Act an acknowledgment of liability needs to be made before the expiration of the period prescribed. Only thus shall a fresh period of limitation commence from the time the acknowledgment is so signed. As the letter dated 18-10-1988 is itself beyond the period of limitation, the provisions of Section 18 of the Limitation Act would have no application and the letter cannot constitute as an acknowledgment of the debt, in terms thereof.

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16. In view of the decision above with which I am in respectful agreement, in view of the clear provisions of Section 18 of the Limitation Act as well as on first principles this Court is of the considered view that the letter of the petitioners 1 and 3 dated 18-10-1988 does not and cannot in law constitute acknowledgment of a debt within the meaning of Section 18 of the Limitation Act.”

10. In rejoinder, Mr. Pandey stated that the alleged loan confirmation letter dated 15th April, 2007 constituted a fresh cause of action in accordance with Sub-section 3 of Section 25 of the Indian Contract Act, 1872 (for short ‘Act, 1872’). Mr. Pandey relied upon illustration (e) as mentioned in Section 25 of the Act, 1872. Both Sub-section (3) as well as illustration (e) of Section 25 of the Act, 1872 are reproduced hereinbelow:-

“25. Agreement without consideration, void, unless, it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law.—An agreement made without consideration is void, unless—

xxx	xxx	xxx
(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.		

xxx	xxx	xxx
Illustrations		
xxx	xxx	xxx

(e) A owes B Rs.1,000, but the debt is barred by the Limitation Act. A signs written promise to pay B Rs.500 on account of the debt. This is a contract.”

11. Mr. Pandey also relied upon a judgment in ***Jai Enterprises Vs. Omega Cables Ltd., (2008) 145 Comp. Cas. 56 (Mad)***. In the said judgment, a Division Bench of Madras High Court has held as under:-

“10..... the court is of the considered opinion that when the defence plea that was stated in the course of the counter was that it was time-barred, it has got to be looked into and decided only on appreciation of evidence and not otherwise. At this juncture, it is pertinent to point out that the learned single judge, at the end of the order, recorded the finding that the claim was time-barred. Now, the grievance was that that finding has got to be removed from the order. Accordingly, that finding is removed from the order. Thus, the question as to whether it is time-barred or not is to be decided only on adducing evidence of both parties and on appreciation of the same. With the above observation, this O.S.A. is dismissed. No costs. It is open to the appellant to make a claim, as per the law, before the appropriate forum for getting appropriate remedy.”

12. Mr. Pandey further stated that Mr. Mahavir Prasad Aggarwal, signatory of the loan confirmation letter dated 15th April, 2007 was an authorised signatory on behalf of the Board of respondent-company at the relevant time and he had been filing pleadings as well as entering into settlements between the respondent-company

and various banks at the relevant time.

13. Mr. Pandey lastly submitted that change of management of the respondent-company could not affect rights/claim of the petitioner who was a creditor.

14. Having heard the parties, this Court is of the opinion that the whole case revolves around the interpretation to be placed upon the alleged loan confirmation letter dated 15th April, 2007. But before any interpretation can be placed on the said letter, the veracity, genuineness and authenticity of the said letter has to be examined.

15. This Court is of the view that the said issue can only be determined by a civil court after giving both the parties an opportunity to lead evidence. This Court may mention that the defence set up by the respondent-company is certainly not a moonshine or a sham inasmuch as the respondent-company has relied upon the balance sheet dated 31st March, 2007. Consequently, genuineness of the loan confirmation letter can only be decided after both the parties have been given an opportunity to lead evidence. Moreover, the balance sheets of the respondent company during the period 1998 to 2006 would also have to be examined by the Court.

16. Accordingly, the present petition is dismissed with liberty to petitioner to file appropriate recovery proceedings in accordance with law. The petitioner would also be at liberty to file an application under Section 14 of the Act, 1963 seeking exclusion of time spent in prosecuting the present proceedings while calculating the period of limitation for the said recovery proceedings.

17. Needless to say, the concerned court/forum would decide the matter without being influenced by any observations made by this Court. All rights and contentions of both the parties are left open.

18. With the aforesaid observations, present petition stands disposed of, but without any order as to costs.

MANMOHAN, J.

MARCH 30, 2012

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