

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

+ **COMPANY APPEAL No. 10/2013**

% **Date of decision: 4<sup>th</sup> February, 2013**

**INTERACTIVE MEDIA AND COMMUNICATION**

**SOLUTION PRIVATE LIMITED** ..... Appellant

Through Mr. Nikhil Magithia, Advocate.

Versus

**GO AIRLINES LIMITED** ..... Respondent

Through Mr. Darpan Wadhwa, Ms. Meghna  
Mishra & Mr. Varun Kumar, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE SANJIV KHANNA**

**HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**

**SANJIV KHANNA, J. (ORAL):**

This intra-Court appeal impugns order dated 7<sup>th</sup> December, 2012 passed by the Company Court dismissing the winding up petition under Section 433(e) read with Sections 434 and 439 of the Companies Act, 1956 (Act, for short) on the ground that the claim was based on the debt, recovery of which is barred under the law of limitation.

2. In the grounds of appeal, it is averred that the Limitation Act, 1961 does not apply to a winding up petition under Section 433(e) read with Sections 434 and 439 of the Act. The contention is legally untenable and has to be rejected. Section 433(e) and Section 434(1)(a) of the Act read as under:

**“433. Circumstances in which company may be wound up by Tribunal.—**A company may be wound up by the Tribunal,—

(e) if the company is unable to pay its debts;

**434. Company when deemed unable to pay its debts. —**(1) A company shall be deemed to be unable to pay its debts—

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding [one lakh rupees] then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;”

(emphasis supplied)

3. Section 433(e) is applicable in case a company is unable to pay its debt. A debt will be something which a person is obliged to pay. A right which can be enforced in law. Section 434(1)(a) incorporates a deeming provision. It creates a fiction which gets attracted in case a creditor serves a notice as stipulated in sub-clause (a). The requirement of the said clause that the company in question should be indebted in the sum of Rs.1 lac then due and requires the said company to pay the sum so due and in case the company neglects to pay the sum etc. within three weeks, a winding up petition under the deeming clause is maintainable. In *Niyogi Offset Printing Press Limited versus Doctor Morepen Limited*, (2009) 149 Company Cases 467 (Delhi), a

similar contention was raised as is apparent from paragraphs 13 and 14:

“**13.** Perusal of the provisions of the Companies Act, 1956 reflects that no limitation is provided for filing the Company Petition under Section 433 or 434 of the Companies Act. However, while considering the application of the creditor for winding up of a company on the ground that the company is unable to pay its debt what is to be seen whether the debt claimed by the creditor is within time or not and if the claim of the debt by the creditor is not within time whether the Company Court should initiate the process of winding up of company who has declined to pay a debt which is not within time.

14. Since no period of limitation is provided in filing the winding up petition, therefore, the application of the petitioner seeking condensation(sic) of delay in filing the winding up petition after the winding up petition filed in the High Court of Himachal Pradesh at Shimla was returned as not maintainable, the present petition can be filed by the petitioner.”

4. What is stated in the said paragraphs is that no period of limitation has been prescribed under the Limitation Act for filing of a winding up petition. However, Section 433(e) stipulates that a winding up petition is maintainable when a company is unable to pay the debt which is due and payable. We have already interpreted Section 434(1)(a), which incorporates the deeming provision. The debt should be one which is legally recoverable and is not barred under the law of limitation. In *Niyogi Offset Printing Press Limited* (supra), in

paragraph 27, it was accordingly held as under:

“27. The claim of the petitioner for recovery of the amount has become barred by time. If the petitioner files a suit for recovery of the said amount, the suit will be dismissed as barred by time. If the claim of the petitioner to recover the amount has become barred by time, it will not be appropriate to initiate the process of winding up of the respondent company. Under Section 433(e) of the Companies Act, 1956 the machinery for winding up can not be allowed to be utilized merely as a means for realizing debts due from a company which is also barred by time. Consequently there are no grounds to initiate the winding up proceedings against the respondent company. The petition, therefore, is without merit is liable to be dismissed. The petition, therefore, is dismissed.”

5. In the present case, the appellant herein had last raised 39 invoices for Rs.67,86,255/- between April, 2007 to March, 2008. Payment of Rs.38,02,495.11 was made by the respondent on or before 12<sup>th</sup> January, 2009. Tax at source was also deducted on the payments and the tax deduction at source certificate was made available on 12<sup>th</sup> January, 2009. The winding up petition in the Delhi High Court was filed on 30<sup>th</sup> November, 2012. It was returned under office objection and was re-filed on 4<sup>th</sup> December, 2012. In the winding up petition, there is no allegation that the outstanding amount of Rs.23,54,853/- was admitted by the respondent as due and payable to the appellant in their books of accounts or in the annual returns, which was filed with the Registrar of Companies. The company petition was, therefore,

filed for recovery of a time barred debt. The company petition does not elaborate and state why and for what reason the debt for which the winding up petition was filed was still due and payable and not barred by limitation.

6. Learned counsel for the appellant has submitted that they should be permitted and allowed to file an application under Section 14 of the Limitation Act as the appellant herein had filed company petition for winding up before the Bombay High Court on 15<sup>th</sup> January, 2011 and the said company petition was dismissed as withdrawn vide order dated 11<sup>th</sup> November, 2011, which reads as under:

“At the request of Mr. Pandey, allowed to be withdrawn with liberty to file fresh petition after statutory notice is addressed to the respondent and duly served at its registered office.”

7. There are several reasons why we cannot accept the said request. The respondent had filed response to the company petition before the Bombay High Court in the month of June, 2011. In the said reply, they had raised objection to the jurisdiction of the Bombay High Court and had stated as under:

“3. At the outset, I submit that the registered office of the Respondent Company has shifted to the National Capital Territory of Delhi and Haryana from the State of Maharashtra with effect from 13<sup>th</sup> April, 2011. Therefore this court has no jurisdiction to try and entertain the captioned Company Petition. Hereto annexed and marked as Exhibit “A”, “A1” and “A2” are copies of Form 18

filed by the Respondent for shifting of registered office, order dated 28<sup>th</sup> January, 2011 passed by the Hon'ble Company Law Board and Certificate issued by the Ministry of Corporate Affairs for change in registered office.

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4. (v) I say that the Respondents by their letter dated 7<sup>th</sup> August, 2009 (Exhibit U to the Petition) in response to the Petitioners letter dated 29<sup>th</sup> July, 2009 (Exhibit T to the Petition), had inter alia stated that the purported notice seeking to claim an amount of Rs.23,54,853/- is bad in law and not maintainable. The said letter was dispatched on the letter head of the Respondent Company and also mentioned the Corporate Office address as well as the Registered Office address of the Respondent Company. It is an admitted position that this communication was received by the Petitioners. The Petitioners therefore had notice of the Registered Office of the Company.

(vi) I say that, the captioned Company Petition which has been filed, wrongly mentions the Corporate Office of the Respondent Company as being the Registered Office of the Respondent Company. Consequently, service of the captioned Company Petition has been effected on the Corporate Office of the Respondent Company.

(vii) The Petitioners have not effected service of the notice of demand on the Registered Office of the Respondent Company. In view thereof, as the statutory/mandatory requirement of service of notice of demand as contained in section 434 (1)(a) of the Act, has not been complied with, the captioned Company Petition ought to be dismissed in limine with costs.”

8. We may further record that the company petition which was filed before the Bombay High Court had relied upon notice of demand dated 29<sup>th</sup> July, 2009, which was issued to the then corporate office and

not to the registered office of the respondent company.

9. Thus even after the reply was filed by the respondent in June, 2011, pointing out that the notice under Section 434(1)(a) had not been served at the registered office, the appellant waited till November 11, 2011 when the company petition before the Bombay High Court was withdrawn. The period after the filing of the reply by the respondent in June, 2011 till 11<sup>th</sup> November, 2011, cannot ex-facie be treated or regarded as a period spent in prosecution of the proceedings in good faith.

10. Even if we exclude the entire period between 15<sup>th</sup> January, 2011 and 11<sup>th</sup> November, 2011 spent before the Bombay High Court, the winding up petition would be for a claim beyond the period prescribed. As noticed above, the last payment was received by the appellant and made by the respondent on 12<sup>th</sup> January, 2009. The period of 3 years, therefore, expired on 12<sup>th</sup> January, 2012. The appellant at best is entitled to exclusion of 301 days for the period between 15<sup>th</sup> January, 2011 and 11<sup>th</sup> November, 2011. The company petition before the Delhi High Court was filed on 30<sup>th</sup> November, 2012 or after 3 years and 323 days (2012 being a leap year). The claim which is made subject matter of the winding up proceedings would still be barred by limitation as the winding up petition in the Delhi High Court was filed belatedly by 22 days.

11. After the company petition before the Bombay High Court was withdrawn on 11<sup>th</sup> November, 2011, notice under Section 434(1)(a) was issued on 15<sup>th</sup> December, 2011 at the registered office of the respondent company. Section 434(1)(a) requires issue of 21 days notice for deeming fiction created by the provision to apply. However, Section 434(1)(a) cannot be strictly equated with mandatory statutory notice like the one required under Section 80 of the Code of Civil Procedure, 1908, when a suit is to be filed against the Government. For initiating civil proceedings for recovery of a debt, no notice under Section 434(1)(a) is required to be issued. Treating the notice under Section 434(1)(a) as equivalent to Section 80 CPC and to give benefit of Section 15(2) of the Limitation Act would, therefore, lead to analogous and somewhat incongruous situation where the creditor cannot sue a company in civil proceedings as time barred debt but can by invoking the exclusion under Section 15(2) of the Limitation Act, sue a company for winding up of company on account of deeming fiction that the company is unable to pay the same debt. However, we need not further dwell and give an affirmation opinion on the said aspect because even if we exclude this period of 21 days under Section 15(2) of the Limitation Act, the winding up petition would still be barred on the date of filing by 1 day. Being in the nature of original proceedings, Section 5 of the Limitation Act would not apply. Even



otherwise, we have noticed that the company petition before the Bombay High Court was withdrawn on 11<sup>th</sup> November, 2011 and then notice dated 15<sup>th</sup> December, 2011 was issued under Section 434(1)(a). Thereafter, the appellant waited for a year and filed the proceedings before the Delhi High Court on 30<sup>th</sup> November, 2012. Thus, the appellant is to be blamed for the lapse and delay in filing the company petition and, therefore, has to bear the consequences.

12. In view of the aforesaid position, we do not find any merit in the present appeal and the same is dismissed. At this stage, learned counsel for the appellant requests and prays that the costs of Rs.10,000/- imposed by the learned Single Judge may be made easy. Learned counsel for the respondent, on instructions has stated that he has no objection if the costs are waived. This statement is taken on record. The costs are waived. The appeal is disposed of accordingly.

**(SANJIV KHANNA)**  
**JUDGE**

**(SIDDHARTH MRIDUL)**  
**JUDGE**

**FEBRUARY 04, 2013**  
**VKR/kkb**