IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO. 3099 OF 2021
IN
COMMERCIAL EXECUTION APPLICATION NO. 849 OF 2019

Drive India Enterprises Solutions Ltd. ...**Applicant**

V/s.

Haier Telecom (India) Pvt. Ltd. and
Olive Global Holding Pvt. Ltd. ...**Respondents**

Mr. Sarosh Bharucha with Ms. Sneha Jaisingh, Mr. Yash Arora and Ms. Janhavi Sakalkar i/b Bharucha and Partners, Advocate for the Applicant.
Mr. Akash Rebello with Mr. Nadeem Shama, Mr. Hubab Sayyed and Mr. Paras Gosar for Respondent.

CORAM : ABHAY AHUJA, J.
DATE : 11th NOVEMBER, 2024

ORAL ORDER :

1. This Interim Application filed by the Judgment Creditor *inter alia* seeks an order and direction against the Respondent, who is stated to be a Garnishee owing Rs. 17,40,82,984/- to the Judgment Debtor, of attachment and of deposit of the said amount in this Court under Order XXI Rules 46 and 46-A of the Code of Civil Procedure, 1908 ("CPC") towards execution of decree drawn up pursuant to final order and judgment dated 10th September, 2018.

2. Mr. Bharucha, learned Counsel for the Applicant has submitted that since the Judgment Debtor failed and neglected and refused to comply with the decree and make payment of the decretal amount of Rs. 64,11,78,970.50 along with interest of Rs. 9,63,32,603.43 and with further interest at the rate of 12% per annum from 11th September, 2018, the Applicant was compelled to file Commercial Execution Application. Thereafter, pursuant to an order passed by this Court in the Chamber Summons taken out in the said Commercial Execution Application, the Judgment Debtor was directed to make disclosures. Mr. Bharucha would further submit that although the Judgment Debtor failed to make timely disclosures, however, from the affidavit dated 22nd June, 2020 filed by the Judgment Debtor, the Applicant became aware that amongst several entities to whom loans and advances were advanced by the Judgment Debtor, a sum of Rs. 17,40,82,984/- was advanced to the Respondent. That from the provisional balance sheet annexed by the Judgment Debtor for financial year 2017-18, 2018-19 and 2019-20 with the affidavit dated 8th March, 2021, it was found that a sum of Rs. 17,40,82,984/- was outstanding from the Respondent. Thereafter, due to persistent non-compliance of the Judgment Debtor, the directors of the Judgment Debtor, who were directed to remain present for oral examination in terms of Section 51 read with Order XXI

Rule 41 of the CPC, that on 1st September, 2021, Mr. Rajesh Duggal, Director, was present and during the course of Mr. Duggal's cross-examination, he admitted that the sum of Rs. 17,40,82,984/- as reflected in the provisional balance sheet of the Judgment Debtor for the financial year 2019-20 was yet to be repaid by the Respondent and was due and recoverable by the Judgment Debtor. Mr. Bharucha would submit that the disclosure affidavits, the provisional balance sheet of the Judgment Debtor for the financial year 2019-20 and the submissions made by Mr. Rajesh Duggal in his deposition on 1st September, 2021, conclusively revealed that the Respondent owed a sum of Rs. 17,40,82,984/- to the Judgment Debtor and is a Garnishee of the Judgment Debtor. Not only that, Mr. Bharucha submits that even the Respondent's financial statements confirm an amount of Rs. 17,40,82,984/- as being due from the Respondent to the Judgment Debtor. Mr. Bharucha would submit that the financial statements of the Respondent for the year ended 31st March, 2023, reflects the amount of Rs. 17,40,82,984/- under Note 5 as other current liabilities towards the Judgment Debtor.

3. Mr. Bharucha, learned Counsel appearing for the Applicant draws the attention of this Court to the notes forming integral part of the

provisional balance sheet as at 31st March, 2020 of the Judgment Debtor as well as notes forming part of the financial statement for the year ended 31st March, 2023 of the Respondent in support of his contentions, which indicates that a sum of Rs. 17,40,82,984/- is due from the Respondent to the Judgment Debtor.

4. Mr. Bharucha has relied upon the decision of the Hon'ble Supreme Court in the case of ***Asset Reconstruction Company (India) Limited Vs. Bishal Jaiswal and Anr.***[1] and in particular refers to paragraph 20 of the said decision which refers to the decision of the Calcutta High Court in the case of ***Bengal Silk Mills Co. Vs. Ismail Golam Hossain Ariff***[2] where it has been held that an acknowledgment of liability that is made in the balance sheet can amount to an acknowledgment of debt.

5. Mr. Bharucha submits that, therefore, this Court direct attachment and deposit of the sum of Rs. 17,40,82,984/- into this Court under Order XXI Rules 46 and 46A of the CPC as previously by order dated 11th March, 2020, this Court had *inter alia* directed the Judgment Debtor (i) not to dispose of, alienate or encumber or part

1 (2021) 6 SCC 366
2 1961 SCC OnLine Cal 128

with its assets without the leave of the Court, and (ii) not to appropriate or alienate its fixed deposits or other securities till 31st March, 2020.

6. Pre-empting the arguments on behalf of the Respondent-Garnishee in view of the reply filed, Mr. Bharucha has referred to Rule 46-C of Order XXI of the CPC as well as the decision of the Calcutta High Court in the case of ***Mackinnon Mackenzie and Company Pvt. Ltd. Vs. Anil Kumar Sen and Anr.***[3] to submit that it is only where the garnishee disputes liability that the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit. Mr. Bharucha submits that in the facts of this case, it is undisputed as can be seen from the statement of accounts of the Judgment Debtor as well as the Respondent that a sum of Rs. 17,40,82,984/- is due to the Judgment Debtor from the Respondent. Mr. Bharucha would submit that only where there is a real dispute, this Court can direct trial and not otherwise.

7. Mr. Bharucha, learned Counsel submits that it is also an admitted position that the Respondent is a 49.90% shareholder of the Judgment

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3 1974 SCC OnLine Cal 64

Debtor with Mr. Arun Khanna (Director of the Judgment Debtor) not only being a Director in both the Companies but also having 80% shareholding in the Respondent. That Mr. Arun Khanna is also a promoter of both the Judgment Debtor and the Respondent. That while the Judgment Debtor and the Respondent are separate entities in law, they are owned and effectively operated/managed by the same person i.e. Mr. Arun Khanna on a day to day basis. Mr. Bharucha would also submit that in fact Mr. Arun Khanna's wife Ms. Ritu Khanna is also a Director in the Respondent. Mr. Bharucha submits that funds have been transferred by the Judgment Debtor to the Respondent only to defeat the Applicant's claim and the decree passed by this Court. That the transaction appears to be nothing but siphoning of monies.

8. Referring to the reply filed by the Respondent, Mr. Bharucha would submit that the transaction between the Judgment Debtor and the Respondent with respect to the third party, viz. HT Media, apart from being a circuitous and collusive transaction between related parties viz. the Respondent and the Judgment Debtor, has nothing to do with the amount disclosed in the balance sheets which has been due from the Respondent to the Judgment Debtor. That even otherwise the said transaction as disclosed in the reply is as of the year 2012, whereas

the financial statements of the Judgment Debtor and the Respondent are respectively of the years 2020 and 2023 and admittedly the Respondent is a debtor of the Judgment Debtor. Mr. Bharucha would submit that in the premises the Respondent has failed to discharge the onus of establishing a valid dispute with regard to the amount owed by it to the Judgment Debtor. There is, therefore, no disputed question which is required to be tried as if it were an issue in a Suit. Mr. Bharucha submits that therefore, there being no real dispute, this Court direct attachment and deposit of the said amount of Rs.17,40,82,984/- into this Court.

9. On the other hand, Mr. Rebello, learned Counsel appearing for the Respondent, at the outset, submits that he has no quarrel with the principle that there should be a real dispute which can be referred for a trial under Rule 46-C of Order XXI of the CPC, however, submitting that in the facts of this case, as stated in the affidavit in reply, the Respondent does not owe any money to the Judgment Debtor as the Respondent has already paid the said money to the HT Media for subscription of shares in the year 2012 and that the entries with respect to the Judgment Debtor in the financial statement of the Respondent are only book/paper entries with no underlying transaction and that

there is a triable dispute. Mr. Rebello has also submitted that there is neither any siphoning of funds even though there may have been a circuitous transaction between the Respondent and the Judgment Debtor as they are related parties.

10. Mr. Rebello relies upon the decision of the Andhra Pradesh High Court in the case of ***Walnut Packaging Private Limited Vs. The Sirpur Paper Mills Limited & Anr.***[4] to submit that even if the transaction between the Respondent and the Judgment Debtor is between related parties, both being separate legal entities, the Respondent cannot be held to be liable for the dues of the Judgment Debtor, which is a separate company.

11. Mr. Rebello further submits that in fact the Respondent has to recover a sum of Rs. 3,13,98,220/- from the Applicant-Decree Holder and the Respondent is in the process of initiating appropriate legal proceedings.

12. I have heard the learned Counsel and considered the rival contentions.

4 2009 (1) A.P.L. J. 155 (HC)

13. Since, Mr. Rebello has accepted the principle that only where there is a real dispute by the Garnishee as to the liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, this Court does not consider it necessary to delve on this subject and suffice it to say that under Rule 46-C of Order XXI of the CPC, where the dispute appears to be frivolous or of no substance, the Court is entitled to direct payment of debt by the Garnishee.

14. In the facts of this case, it is not in dispute that the financial statement of the Respondent as exhibited at Exhibit A at page 97 to page 113 and in particular page 97 and page 102 record that a sum of Rs. 17,40,82,984/- is a liability which the Respondent owes to the Judgment Debtor as on 31st March, 2023. The Note No.7 at Exhibit F (page 62) which is part of the provisional balance sheet of the Judgment Debtor as on 31st March, 2020, at serial no. 3 also clearly indicates that there is a long term loan and advance given by the Judgment Debtor to the Respondent viz. Olive Global Holding Pvt. Ltd. In *Asset Reconstruction Company (India) Limited Vs. Bishal Jaiswal and Anr. (supra)* the Hon'be Supreme Court has reiterated that an acknowledgment of liability made in a balance sheet can amount to an

acknowledgment of debt. Neither of these financial statements or their contents have been disputed by the Respondent, except to say that no monies are due from the Respondent to the Judgment Debtor as a sum of Rs. 17,61,22,150/- which includes the amount of Rs.17,40,82,984/- has been paid by the Respondent to the HT Media towards share subscription in the year 2012 and that the entries in the financial statements are mere book entries and paper transactions.

15. As noted above, Mr. Rebello has also submitted that the Respondent has to recover the sum of Rs. 3,13,98,220/- from the Applicant-Decree Holder and the Respondent is in the process of initiating appropriate legal proceedings.

16. I am of the view that the dispute or objection sought to be raised by the Respondent-Garnishee is without any substance. The financial statements recording the liability of the Respondent to the Judgment Debtor are of 2020 and 2023 respectively, whereas the alleged transaction with HT Media, based on which dispute is sought to be raised is of the year 2012. This is ex-facie without substance and misconceived. There is no real dispute. The Respondent has failed to discharge the onus of establishing a valid dispute with regard to the

amount owed by it to the Judgment Debtor. There is no disputed question which is required to be tried as if it were an issue in a suit. The acknowledgment of liability which is based on the financial statements of both the Judgment Debtor and the Respondent is clear. There is no *bona-fide* dispute. What is sought to be raised is something frivolous and unsubstantiated. I am, therefore, in agreement with Mr. Bharucha's submissions and his reliance on the principles laid down in the decision of the Calcutta High Court in the case of *Mackinnon Mackenzie and Company Pvt. Ltd. Vs. Anil Kumar Sen and Anr. (supra)*. Without commenting on the circuitous and collusive transaction of the Respondent, Judgment Debtor and HT Media, the submission by Mr. Rebello that the entries in the audited accounts are only book entries and paper transactions is only stated to be rejected. It is not Mr. Rebello's case that the said accounts are forged or false. Further, even if there is a claim that the Respondent has against the Applicant, there is no adjudicated claim as admittedly the Respondent is in the process of initiating separate legal proceedings and that certainly cannot be a ground to delay the payment that the Respondent owes as Garnishee to the Applicant, the financial statements/books of accounts referred to above clearly indicating that the sum of Rs. 17,40,82,984/- is outstanding from the Respondent to the Judgment Debtor.

17. Mr. Rebello's reliance upon the decision of the Andhara Pradesh High Court in the case of *Walnut Packaging Private Limited Vs. The Sirpur Paper Mills Limited and Anr (supra)*, in my view, would also not be relevant in the facts of this case in as much as in the facts of that case the Court was considering the liability of a holding company for the debts of a subsidiary company in the case of a winding up of the subsidiary company, where the Andhra Pradesh High Court held that even if the subsidiary company is promoted by the holding company, it is not enough to pass any liability on the holding company as both the companies are separate legal entities and the liability of one cannot be passed on to the other even if they are managed by the same Board of Directors. In the facts of the present case, we are not concerned with the winding up of any of the companies but execution of a decree under Order XXI of the CPC and in particular under Rule 46-A on the basis of what has been categorically stated in the statement of accounts/financial statements of both the companies, where it has been clearly recorded that a sum of Rs.17,40,82,984/- is due from the Respondent to the Judgment Debtor. Therefore, the decision in the case of *Walnut Packaging Private Limited Vs. The Sirpur Paper Mills Limited and Anr (supra)*, does not assist the case of the Respondent.

18. In view of the above discussion, I have no hesitation in holding that there is no dispute that the Garnishee viz. the Respondent owes sum of Rs.17,40,82,984/- to the Judgment Debtor.

19. Accordingly, this Court directs attachment and deposit of Rs. 17,40,82,984/- in this Court within a period of six weeks in terms of prayer Clauses (b) and (c), which read thus:-

> "b. That this Hon'ble Court be pleased to pass an appropriate order and direction under provisions of Order XXI Rule 46 of the CPC attaching the sum of Rs. 17,40,82,984/- in the hands of the Respondent / garnishee by issuing a Warrant of Attachment in respect thereof, prohibiting the Respondent from paying the said amount or any part thereof to the Judgment Debtor and prohibiting the Respondent from parting with or in any manner dealing with the said amount or any part thereof until further orders of the Court;
> c. That this Hon'ble Court be pleased to pass an appropriate order and direction in terms of Form 47 read with Rule 345 of the Bombay High Court (Original Side) Rules, 1980 read with Order XXI Rule 46-A of the CPC for issuing notice to the Respondent and directing the Respondent to deposit in this Hon'ble Court the sum of Rs. 17,40,82,984/- (Rupees Seventeen Crores Forty Lakhs Eighty-Two Thousand Nine Hundred and Eighty-Four only)."

20. Goes without saying that the Applicant is at liberty in terms of prayer Clause (d) to withdraw this amount by making an appropriate application to the Prothonotary & Senior Master, after the same is deposited in this Court.

21. The Application accordingly stands allowed and disposed as above.

(ABHAY AHUJA, J.)