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

% *Date of Judgment:14.03.2013*

\+ **Co. Appeal. No.25/2012**

ZTE CORPORATION ..... Appellant
Through: Mr. Amit Sibal, Mr. Biswajit Dubey, Mr. T. Mandal, Ms. Gargi Jha & Mr. Ajay Roy, Advs.

versus

SIDDHANT GARG & ORS. ... Respondents
Through: Mr. Arun Bhardwaj, Sr. Adv. with Mr. Vishal Malhotra, Adv. for R-1 & 2.
Mr. Ankur Chibber, Adv. for R-3.
Mr. J.P. Sengh, Sr. Adv. with Mr. Sumeet Batra & Ms. Ankita Gupta, Advs. for R-4.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The appellant is aggrieved by the order dated 08.2.2012 wherein the application filed by him (Company Application No.2103/2011) under order I Rule 10 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as "the Code") seeking impleadment in the proceedings pending under Section 560(6) of the Companies Act, 1956 (hereinafter referred to as "the Act") had been dismissed.

2 Record shows that the company M/s Value Advisory Services

Private Ltd. (VAS- hereinafter referred to as "the Company") was struck off from the Register of the Registrar of Companies (ROC) on 29.12.2006 which was pursuant to a Simplified Exist Scheme, 2003; it was on the application made by the company itself.

3 The appellant before this Court is M/s ZTE Corporation (a company based in China). The appellant and the company had entered into a consultancy agreement dated 01.01.2003; disputes arose between the parties which disputes were referred to arbitration in Singapore. Certain interim directions were passed in those arbitral proceedings. The company obtained a partial Award and its favour on 09.11.2009; final Award was passed on 23.7.2010 which, we have been informed, is of one million dollars exclusive of interest. These Awards had been passed in favour of the company and against the appellant. Execution petition No.334/2010 was filed by the company seeking execution of both the partial Award and the final Award. Objections were filed by the appellant in this execution petition; primary objection taken by the appellant was that the company was non-existent on the date of the passing of the Award; as such the Award is a nullity. The company having been struck off from the Register of the ROC on 29.12.2006 which fact came to the light and to the knowledge of the appellant much later i.e. sometime in January, 2007.

4 Record further shows that C.P. No.200/2011 was filed on 20.4.2011 by two petitioners Sidhant Garg and another. This petition under Section 560(6) of the said Act sought restoration of the respondent company in the Register maintained by the ROC. In this

petition, it has been averred that the petitioners are creditors of the company and their outstanding salaries amounting to Rs.6,54,000/- have to be paid to them by the company; to support their submission the balance sheet of the company for the year 2000 had been filed. The company was served and was represented through counsel. The company did not dispute its liability towards the creditors and in fact admitted that as per the last balance sheet of the company an amount of Rs.10,94,665.21 were the current liabilities of the company which included the dues of the two petitioners. This balance sheet is a part of the record. Company Application No.2103/2011 had been filed in these proceedings on 17.8.2011 seeking impleadment. Learned single Judge had answered the arguments of the appellant; presumably his locus standi to advance arguments had been accepted; his submissions had, however, been negatived. The impugned order had restored the name of the company. This was after a report had been obtained from the ROC.

5 Learned senior counsel for the appellant submits that under Section 560(6) of the said Act it is only a bona fide and a genuine creditor who can seek restoration of the company; it cannot be an exercise of mala fides which was so in the instant case. Submission being that the present petition had been filed as a collusive petition between the alleged two creditors and the company wherein company chose not to oppose the petition only for an ulterior purpose. Ulterior purpose being that after the restoration of the company, it would be in a position to execute the Award against the appellant which Award had

been obtained by playing a fraud upon the Court as the company did not intentionally and deliberately disclose before the Arbitral Tribunal that the name of the company had already been struck off from the ROC on 29.12.2006 and the partial Award and the final Award which were passed subsequent thereto could not have been so passed in favour of the company as the company was a non-existent entity on the aforenoted dates. The fact that this is a collusive petition is fortified by the record which shows that there was no occasion for the petitioners to have known about the striking off of the name of the company unless it was informed to them by company itself and the very fact that the company chose not to oppose this petition which was based on a claim/credit of the year 2000 when this petition was filed in the year 2011, the claim of the so-called petitioners/creditors would have been barred by time but the company chose not to oppose this petition. This itself reflects upon the mala fides and the collusive approach inter se the parties.

6 On the preliminary submission of locus, the learned senior counsel for the appellant has relied upon *Re Jayham Ltd.* [1996] B.C.C. 224 a judgment of the Chancery Division to support his submission that the provisions of Section 653 of the English Companies Act, 1985 are parameteria Section 560(6) of the Companies Act, 1956 and apart from the company, member or a creditor in the facts of a given case even a third party may be permitted to intervene. Submission being that in that case S who was a surety for Jayham's obligations, was permitted to be joined in the restoration application even though he neither fell in the category of a "company", "member" or "creditor".

7 Impugned order shows that the learned single Judge had dealt with all the arguments which have now been propounded before this Court. This was obviously on the presumption that the appellant did have the locus standi to intervene. The test of locus standi laid down in this judgment had been summarized as under:

> *"The question then of course remains as to whether in a particular case a party should be allowed to be joined, and the test appears to be that laid down by Hoffmann LJ in which the refers to the two categories of case. Equally of course the court must then pay some regard to the claim which is put forward by the applicant, that he would be adversely affected by the decision and that he has a case for saying that it would not be just for the company to be restored. I may well be that in most cases a third party would not have any sufficient grounds for resisting the order, and I have to consider whether this is such as case."*

8 There is no doubt that the submission of the appellant is founded on his plea that he has been adversely affected by the impugned order. He had suffered a decree in terms of the partial Award and the final Award which has been passed in favour of the company and against the appellant. But it is not as if the appellant had no alternate remedy. Record shows that the appellant had in fact in the execution petition filed by the company filed his objections (E.A. No.269/2011) raising a plea about the nullity of the Awards on the ground that the company was non-existent on the date of the passing of the said Awards. This execution petition was withdrawn by the decree holder on 23.9.2011; it had been noted that the company had filed a petition before the

Company Judge seeking a restoration of the company; at the time of the withdrawal of the execution petition liberty had accordingly been granted to the company to file a fresh petition as and when the occasion arose. The right of the appellant to file objections as and when execution is filed has not been lost. This remedy is still available to him. Section 560(6) of the Act reads as under:

> *"560. Power of Registrar to strike defunct company off register-*
> ……..
>
> *(6) If a company, or any member or creditor thereof, feels aggrieved by the company having been struck off the register, the [Tribunal], on an application made by the company, member or creditor before the expiry of twenty years from the publication in the Official Gazette of the notice aforesaid, may, if satisfied that the company was, at the time of the striking off, carrying on business or in operation or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register; and the [Tribunal] may, by the order, give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."*

9 Before exercising discretion under this section, the Court must be

(i) satisfied that the company was, at the time of striking of the company, carrying on business or was in operation;

(ii) it is otherwise just that the company be restored.

The first of this proposition can be answered by a report of the ROC which in this case was positive and this report of the ROC had in fact been considered while passing an order for the restoration of the company. The second is a prima facie finding by the Court persuading it to believe that it was "just" to restore the company.

10 The judicial precedents on this subject clearly are in favour of the restoration of the company and it is only by way of an exception that the restoration should be disallowed. Normally the rule is to allow the restoration. Exercising discretion against restoration would thus be an exception and not the rule. The court would also be vary of refusing restoration so as to possibly safeguard the interest of one particular class of affected persons. This is a discretionary power and is evident from the use of the word "may" in Section 560(6). A statutory period of 20 years limitation has also been provided in the section for a party to seek restoration. If such a party succeeds the company would be deemed to have been continued in its existence. These observations were quoted with approval by LADDIE J *Re Priceland Ltd.* [1997]1BCLC 468.

> *"These considerations lead me to the view that the court should be very wary of refusing restoration so as to penalise a particular applicant or in a possibly futile attempt to safeguard the special interests of a single or limited class of affected persons. It would need a strong case to justify a refusal on these grounds. For the reasons set out below, I do not think there are such strong grounds here."*

11 Merely because a financial loss would be suffered by the appellant qua the arbitration Awards which had been passed against him would not entitle him to come under the exception seeking a refusal of the restoration of the company. The position of the company vis-à-vis this stand is that a healthy company who was admittedly operational at the time when its name was struck off would be deprived of its right to function as a going concern and in the bargain would not be permitted to

recover its dues which amounts have accrued to it under the Awards of the Arbitral Tribunal.

12 In this factual scenario, in no manner can it be said that it would not be "just" to restore the name of the company. The concept of "just" being to enable a person to get his due; based in turn on the concept of fairness.

13 The positive averments made by the petitioners in the petition (C.P. No.200/2011) alleging to be creditors of the company were dully supported by the balance sheet of the company (year ending 2000) which is an undisputed document and a part of the record of the ROC. The elaborate submission of the learned senior counsel for the appellant that the petitioners are in fact nothing but stooges of the company thus does not hold water. They had prima facie established themselves as creditors of the company. The merits of their claim were not being adjudicated upon and was also not necessary to answer the prayers in the petition under Section 560(6) of the Act.

14 The last submission urged by the learned senior counsel for the petitioner was based on the principle of *res judicata*. To support this submission attention has been drawn to earlier order passed by the learned Company Judge in Company Petition No. 72/2009 dated 23.4.2010 wherein the petition filed by the company seeking a restoration of the name of the company to the Register of the ROC had been declined. Submission being that while declining this prayer of the company the Court had noted that the company had voluntarily sought

to get its name struck off under the Simplified Exist Scheme and chosen not to exercise its option under Section 3(3) and Section 3(5) of the said Act to enhance its capital to the statutory mandate of Rs.1,00,000/-. Submission being that this order had become final noting that the company shall be deemed to be a defunct company. The same issue could thus not be re-agitated; the rule of constructive *res judicata* is also applicable.

15 This argument of the learned senior counsel for the appellant is noted only to be rejected. The object of Section 11 of the Code is to confer finality to a decision arrived at by a competent court between interested parties after a genuine context; once the matter has been determined by such a competent Court neither party can be permitted to re-open it in a subsequent litigation. It is based on the principle of giving a finality to a judicial decision. Constructive *res judicata is* contained in Explanation IV to Section 11 of the Code; it refers to pleas which could have been taken but not actually taken and those not actually taken cannot thus be heard. The plea of the appellant being that the petitioners before the single Judge were nothing but stooges of the company and since the order dated 23.4.2010 was binding upon the company, it would operate as a *res judicata* qua the two petitioners as well has already been answered by this court by holding that the petitioners had set up a valid claim of being creditors of the company dully supported by the balance sheet of the company which document remained un-assailed even by the ROC and which document in fact reflected that the company had a liability of more than Rs.10 lacs

towards its creditors which included the aforenoted two petitioners. It is also undisputed that the order dated 23.4.2010 was an *inter se* lis between the company and the ROC; the petitioners in Company Petition No.200/2011 were not a party to the proceedings of 23.4.2010. Doctrine of *res judicata* was wholly inapplicable.

16 On no count can the petitioners succeed. This appears to be a classic case where the appellant is making desperate effort by one way to ward off its liability which he admittedly owes to the company in terms of the Arbitral Awards which has been passed against him. It is also not a case where the appellant would be remediless, he has the option to contest the Award at the time as and when the execution proceedings are filed by the company.

17 Impugned order in no manner suffers from any infirmity. Petition being without merit is dismissed with costs quantified at Rs.5000/- payable to each of the respondents i.e. respondent nos.1,2 and 4.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

MARCH 14, 2013
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