

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN  
AT JAIPUR BENCH

ORDER

(S.B. Company Petition No.24/2010)



M/s. Shree Balkrishna Commercial Company Ltd., a company incorporated under the provisions of the Companies Act, 1956 having its registered office at 12, Crooked Lane, 1<sup>st</sup> Floor, Kolkata-700069.

--- Petitioner

Versus

M/s. Ask Dairies Pvt. Ltd., a Company incorporated under the provisions of the Companies Act 1956 having its registered officer at D/89/B, Meera Marg, Bani Park, Jaipur.

--- Respondent

In the matter of Section 433(e), 434 and 439 of the Companies Act, 1956.

Date of Order:

April 7, 2017.

PRESENT

HON'BLE MR. JUSTICE ALOK SHARMA

Mr. Sandeep Taneja, for the petitioner.

Mr. Amol Vyas, for the respondent.

BY THE COURT:

This petition filed by the petitioner company M/s. Shree Balkrishna Commercial Company Limited (hereinafter 'the petitioner company') under Section 434 of the Companies Act, 1956

(hereinafter 'the Act of 1956') seeks winding up of the respondent company M/s. Ask Dairies Private Limited (hereinafter 'the respondent company') for reason of its inability to repay the due, outstanding admitted loan amount of Rs.20 lacs along with interest @ 36% per annum despite a statutory notice under Section 434(1)(a) of the Act of 1956.



2 The respondent company having remained ex-parte despite service, on the material on record and submissions of petitioner company's counsel the winding up petition was admitted on 24-4-2015 and provisional liquidator appointed. Citation of admission of winding up petition has been published as directed in two newspapers as also the Gazette.

3. Be as it may, the counsel for the respondent company on 3-6-2016 sought time to file reply to the winding up petition, post admission. The prayer was allowed on payment of cost of Rs.50,000/-. In compliance, the reply to the winding up petition has been filed.

4. In response to the case set up by the petitioner company in the winding up petition, one defence of the respondent company is that the alleged debt is non existent and in fact the payment of Rs.20 lacs

was towards the liability of one Clean Green Energy Private Limited (hereinafter 'the CGEPL') to the respondent company paid by the petitioner company under an arrangement so to say as Arun Kumar Jain, Director of the petitioner company also a shareholder/ director in the CGEPL, CGEPL had entered into a consultancy contract in relation to a Solar Power Project with the respondent company on 24-7-2010. In terms of the payment scheduled thereunder a sum of Rs.20 lacs was payable to the respondent company by CGEPL as a first tranche. The payment of Rs.20 lacs in the account of the respondent company on 23-8-2010 by the petitioner company controlled by Arun Kumar Jain thus related to the discharge of CGEPL's obligation to the respondent company. To support the aforesaid defence Bill No.ASK/CGEPL.CONSULT/01 dated 20<sup>th</sup> August, 2010 drawn on CGEPL for services to be rendered by the respondent company has also been adverted to. The other submission in defence, albeit mutually destructive of the one earlier taken as above, is that the amount of Rs.20 lacs related to a request made by Alok Pareek Director of the respondent company to the petitioner company under e-mail dated 18-8-2010 for financial assistance to tide over a crisis being faced by the respondent company. As per the aforesaid e-mail, the loan was to be repaid by 31-12-2010. Pursuant to the financial assistance sought, the loan was made over on 23-8-2010, but yet on 17-11-2010, before due



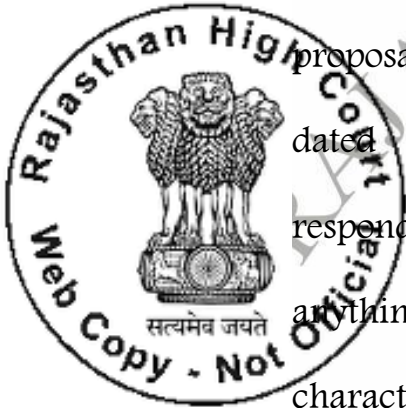
and repayable i.e. before 31-12-2010, a notice of winding up purporting to be under Section 433(e) of the Act of 1956 was issued and the winding up petition was filed on 21-12-2010, both prematurely. Hence the winding up petition be dismissed.



5. In rejoinder, the petitioner company has submitted that its specific case set up in the petition is that the loan of Rs.20 lacs on 28-8-2010 did not relate to the e-mail of 18-8-2010 but, was founded following negotiations on an oral contract, only for a period of one month and to carry interest @ 36% p.a. Thus neither the notice under Section 433(e) of the Act of 1956 was premature, nor was the laying of the winding up petition making it liable to be dismissed. It has been submitted that Alok Pareek's e-mail dated 18-8-2010, seeking funds for the respondent company's smooth running of business does not partake the character of more than a cry for help. It was not a proposal. In the said e-mail Alok Pareek, merely stated that in the event of the respondent company being provided funds by the petitioner company it would be repaid before 31-12-2010. No amount to be availed as loan was referred to. Nor was the rate of interest which was definitely chargeable as the petitioner company is in business where there is cost to money and not in charity, was mentioned. He submitted that the Contract Act, 1872 defines a proposal as obtaining when a person signifies to

another his willingness to do one thing or abstain to do anything with a view to obtaining the assent of that other to such act or abstinence. Further when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a binding contract. The e-mail dated 18-8-2010 is not even remotely an expression of the respondent company's readiness to do or to abstain from doing anything. It is neither certain nor definite—an essential characteristic of a proposal. No acceptance could possibly be made thereof. It was not. No contract could have thus been formed—as was not. It has been submitted that however the petitioner company following the request for financial help by the respondent company in Alok Pareek's e-mail of 18-8-2010 on the basis of oral negotiations made over as loan to the respondent company by way of RTGS a sum of Rs.20 lacs credited to its bank account with IDBI Jaipur on 23-8-2010. As orally agreed the term of the loan was one month and it was to carry interest @ 36% p.a. Mr. Sandeep Taneja submitted that the defence set up by the respondent company on the notice dated 17-11-2010 and the winding up petition being premature is on its own ipse dixit, false and completely without merit.

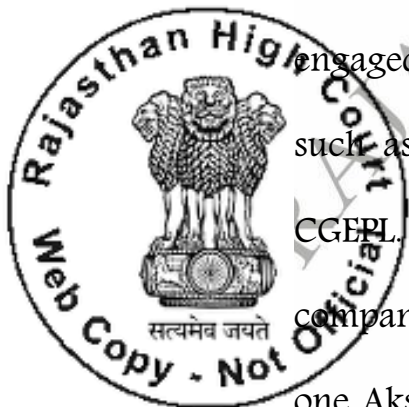
6. It has been submitted that the petitioner company, an



independent juristic personality, has no concern with the business of CGEPL or even the other business interests or purported liability thereunder of its director/ shareholder/s in individual capacity. And in any event the purported consultancy agreement dated 24-7-2010 between the CGEPL and the respondent company is prima facie fabricated, as is the bill dated 20-8-2010 drawn by the respondent company on CGEPL. It has been submitted that the entire camouflaged of a purported dispute sought to be created qua the unpaid debt of Rs.20 lacs with reference to the purported participation of Arun Kumar Jain, in his individual capacity in the business of CGEPL is absolutely untenable. That defence for one is oblivious of the fact that the petitioner company is a juristic personality independent and distinct from its directors/ shareholders including Arun Kumar Jain. The purported consultancy agreement dated 24-7-2010 between the CGEPL and the respondent company has been signed by one Ajay Pareek, brother of Alok Pareek on behalf of CGEPL and Akshay Kumar Bhargava, co-promoter director of the respondent company along with Alok Pareek, who himself is a witness thereto. The Bill No.1/2010 is made attention by Ajay Pareek for CGEPL to Alok Pareek for the respondent company. It has been submitted that falsity of respondent company being engaged for consultancy by CGEPL for its Solar Power Project is crystal clear from the fact that the Memorandum of Association of the respondent



company does not contain any object—main, incidental or ancillary of engaging into such business. Further from the balance-sheets filed with the Registrar of Companies as available on the date of filing of the petition it is evident that the respondent company engaged only in dairy business and never in consultancy services such as for setting up Solar Power Plant as it allegedly did with CGEPL. It has been submitted that CGEPL was incorporated as a company by Alok Pareek, also director of respondent company and one Akshay Kumar Bhargava, both promoter directors. Alok Pareek is also director with CGEPL. It has been submitted that in fact qua CGEPL's interest in solar project a memorandum of understanding dated 26-7-2010 was in fact drawn between CGEPL and M/s Rudraksh Energy Jaipur for retaining the later company securing PPA and completing various activities required to set up 5 MW Solar Power Plant by CGEPL. The agreement was signed by Alok Pareek as director of the CGEPL. And vide letter dated 13-8-2010 addressed to M/s. Rudraksh Energy as director of the CGEPL, Alok Pareek requested for the identification and acquisition of land in Naukh Area for the purpose of 5 MW Solar Power Plant. M/s. Rudraksh Energy raised bills toward CGEPL for consultancy services. It has been submitted that if at all the CGEPL had entered into an agreement on 24-7-2010 with the respondent company for consultancy services in setting up a 5 MW Solar Power Plant, there



was no occasion for the CGEPL to have entered into a subsequent agreement dated 26-7-2010 with Rudraksh Energy which was an established solar power consultancy firm promoted by one D.S. Agrawal, a retired Chief Engineer from Rajasthan State Electricity Board. Rudraksh Energy. Contrarily the respondent company was engaged in the business of dairy and did not have any expertise in Solar energy to be given consultancy field.



7. It has been submitted that shorn of all the above false and imaginary facts taken as defence to the winding up petition in the reply to the winding up petition, the respondent company has not disputed either the receipt of the notice for winding up sent on 17-11-2010 nor the receipt of Rs.20 lacs from the petitioner company's account with the HDFC Bank Gaziabad by way of RTGS transfer to its account No.142655100000347 maintained with the IDBI Jaipur.

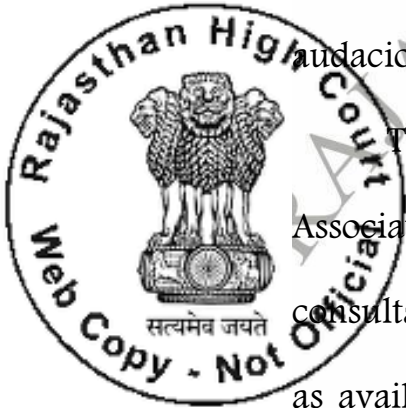
8. It has been further submitted that the respondent company is even otherwise commercially insolvent as it has also defaulted in making payment to secured creditors, as evident from the notice published in the news-paper in the matter of IDBI Vs. ASK Dairies Private Limited, Recovery Case No.62/2012, before the Recovery Officer, Debts Recovery Tribunal, Jaipur.

Heard. Considered.



9. Mr. Sandeep Taneja appearing for the petitioner company submitted that a case of winding up of respondent company is clearly made out in law notwithstanding its desperate and audaciously false defence.

The respondent company under its Memorandum of Association was not authorised to do business in the area of solar consultancy. Further the balance-sheet of the respondent company as available does not reflect any business in solar energy or other consultancy. Mr. Sandeep Taneja further pointed out that in para 14 of the reply the respondent company admitted that an unsecured loan of Rs.20 lacs was advanced to the respondent company. The aforesaid admission is categorical and binding on the respondent company. It is estopped from renegeing on it. It has been submitted that the respondent company also admits the receipt of statutory notice dated 17-11-2010 for winding up under the Act of 1956 and that no reply thereto was filed. Mr. Sandeep Taneja submitted that in view of the aforesaid admission the debt of Rs.20 lacs to the petitioner company is duly admitted by the respondent company and all defences now laid are not bonafide and far from being substantial. Mr. Sandeep Taneja placed reliance on the judgment of Karnataka High Court in the case of P.Y. Parry Vs. Cynotech Bioproducts P. Ltd [2001(103) Company Cases 113], wherein it was



held that it was settled beyond any cavil that unless a dispute to a debt on which a winding up petition is filed, is prima facie and founded on plausible grounds making out a triable issue, a winding up should follow. Reliance was also placed on the Apex Court judgment in the case of Vijay Industries Vs. NATL Technologies Limited [2009(3) SCC 527], wherein it has been held that when a debt was not disputed on substantial and/ or bonafide grounds, the court should order a winding up of the defaulting respondent company.

Mr. Sandeep Taneja submitted that in the case at hand the loan amount of Rs.20 lacs having been admitted by the respondent company and it having not repaid it despite a notice for winding up under the Act of 1956 and instead raising false pleas, outlandish and misleading defence on fabricated and forged documents, the winding up of the respondent company be directed for reasons of its inability to pay its debts in the course of its business and in public interest.

10. Mr. Amol Vyas for the respondent company reiterated the reply to the petition emphatically submitting that the relationship between Arun Kumar Jain, director of the petitioner company and Alok Pareek, director of the respondent company was multifaceted and complex. Their individual actions cannot be seen in isolation but



even when apparently distinct with reference to a company, whether CGEPL or the respondent company ASK Dairies were inter-related. The winding up petition is based on a mechanical segregation in an attempt to benefit from one part of inter connected transactions while jettisoning the onerous one inter related transactions. He submitted that from the several transactions between Arun Kumar Jain and Alok Pareek, wholistically considered a bonafide dispute regarding the alleged debt of Rs.20 lacs with reference to the loan purportedly admitted by the petitioner company to the respondent company obtains. It is neither far fetched nor a sham. It is bonafide based on substantial grounds. While eschewing liability for business failure of CGEPL directly attributable to breaches by Arun Kumar Jain of his obligation to CGEPL, the petitioner company seeks to unjustly force on the Rs.20 lac advance to the respondent company alleging non payment of the purported disputed debt and seeking its winding up. He submitted that the winding up petition is thus being used to extract disputed amounts from the respondent company and the court must not countenance, such a situation of the abuse of the process of law.

11. No doubt, a winding up petition is not an instrument for recovery of a disputed debt. No doubt when a bonafide dispute as to an alleged debt obtains on plausible grounds which raises a trial



issue, a winding up court will not exercise its jurisdiction. But equally true is that where a debt due payable yet unpaid despite a statutory notice is made out, a winding up order is to ordinarily follow unless a case of overarching public interest to the contrary is made out. The policy of law is that company incorporated under the Act of 1956 enjoying limited liability should not, when unable to discharge due debts be allowed to continue to operate inter alia for reasons of commercial morality where the unsuspecting public enters into business with it to its and public detriment.



12. The Hon'ble Apex Court in the case of Vijay Industries Vs. NATL Technologies Limited [(2009)2 SCC 527] has held that following considerations are to be kept in mind by the Company Court while addressing a winding up petition:-

- (i) Whether the debt due as claimed is prima facie made out;
- (ii) Whether the respondent company has neglected to pay its debt;
- (iii) Whether there is a bonafide dispute with regard to the debt claimed by the petitioner company;
- (iv) Whether the defence to the winding up petition set up is one of the substance.

13. The Apex Court in IBA Health (India) Pvt Ltd. Vs. Info Drive Systems SDN Bhd. [(2010)10 SCC 553] has held that only a

substantial, genuine and bonafide dispute can be considered as a defence in the winding up petition and not one that is spurious, speculative, illusionary or misconceived.



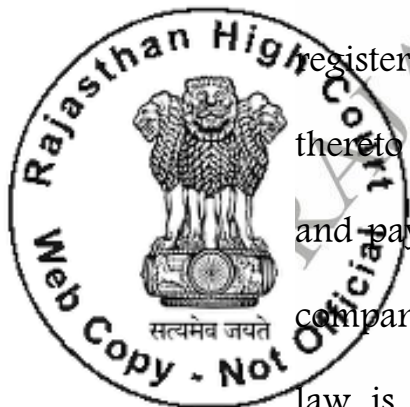
14. In the case of P.R. Parry Vs. M/s. Cynotech Bioproducts Pvt. Ltd. [AIR 1999 (Karnataka) 331] it has been held that in case the company fails to discharge its liability on account of a clear debt even after lapse of considerable time from service of the notice of winding up presumption of commercial insolvency of the company would arise and a winding up order follow until a bonafide dispute is made out.

15. In the instant case the facts are telling. Admittedly a sum of Rs.20 lacs was transferred by the petitioner company from its account maintained with the HDFC Bank Ltd. Raj Nagar Branch Gaziabad to the respondent company's bank account 142655100000347 with the IDBI Bank at Jaipur. A notice for winding of the respondent company albeit under Section 433(e) of the Act of 1956 came to issue by the petitioner company on 17-11-2010 for non payment of the amount advanced despite the period for which the money was lent having expired, with one month lapsing. The notice for winding up in event of non payment of due being under Section 433(e) and not 434(1)(a) of the Act of 1956

was not fatal, amount being under Section 433(e) and not 434(1)(a) of the Act of 1956 was not fatal to the laying of the winding up petition as its contents squared up with the requirement of law. The receipt of the notice addressed to the respondent company's registered office has not been denied. No reply was forthcoming thereto by the respondent company. The debt amount claimed due and payable under the notice not paid. Resultantly the respondent company having neglected to pay despite a notice of winding up, in law is to be deemed to be insolvent. And in the policy of law encapsulated in Section 433(e) of the Act of 1956 liable to be wound up.

16. The defence of the respondent company to the winding up petition instead of being bonafide and based on substantial grounds worsens the case for it, false and mutually destructive as its pleas are.

17. Contention of Mr. Amol Vyas that the notice for winding up sent by the petitioner company on 17-11-2010 was premature as the debt was then not due is wholly baseless, founded as it is only an assumption (not fact) that the loan amount of Rs.20 lacs was repayable on 31-12-2010 not before. There is nothing on record to buttress the contention. Reliance on Alok Pareek's, Director of



respondent company, email of 18-8-2010 for this purpose is without merit. The said e-mail reads as under:-



“Dear AKJ ji,  
Refer to our telecom, we need funds for smooth working for Ask as market is slowing down. I propose you to arrange for funds on interest basis intention showed during one of our meetings. This fund will be returned before 31-12-10.  
Warm Regards  
Alok”

18. Quite clearly the said e-mail does not partake character of a proposal in law acceptance of which as has been alleged could entail a binding contract. The e-mail does not even state the loan amount/ fund sought. It does not offer to do an act or abstinence by the respondent company for a consideration. It cannot even remotely be considered to have intended to create by itself a legal relationship between the respondent company and the petitioner company. No contract in law could emanate from the acceptance thereof if there indeed was any. And there could not be nor was in fact. The date of 31-12-2010 mentioned in the e-mail of Alok Pareek sent to the petitioner company on 18-8-2010 is thus of no avail. The e-mail cannot relate to the contract of loan coming into force on 23-8-2010 with the transfer of Rs.20 lacs by the petitioner company to the bank account of the respondent company. The defence of the

respondent company that the loan amount of Rs.20 lacs was not payable before 31-12-2010 rendering both the notice of 17-11-2010 and winding up petition consequentially filed on 21-12-2010 premature is without substance and liable to be rejected . As this is.



19. As far as other extreme spectrum of the defence of the respondent company that the amount of Rs.20 lacs was payment by the petitioner company of the liability of CGEPL to the respondent company is concerned, it is audaciously and shockingly both false and without legal substance. For one, the petitioner company incorporated under the Act of 1956 is an independent juristic personality distinct, and different from its director/s/ promoter/s and shareholder/s. The other business interests of the shareholder/s/ director/s/ promoter/s of the petitioner company thus in law cannot have any bearing on the rights, obligations and liabilities of the petitioner company. In this context, the doings of Arun Kumar Jain with regard to his interest in solar power business through the instrument of CGEPL, another incorporated company of which Alok Pareek was a director/ shareholder, are of no event for the right of the petitioner company to recover its due debt from the respondent company. Hence the alleged obligation of Arun Kumar Jain to CGEPL or the alleged liabilities of CGEPL to the respondent company under the alleged consultancy agreement of 24-7-2010 cannot be a



defence in law, what of bonafide and substantial to the winding up petition. There is substance in the case of the petitioner company that even otherwise both the consultancy agreement of 24-7-2010 and the following bill dated 20-8-2010 between the petitioner company and CGEPL are got up documents, and set up in a desperate attempt to derail the winding up petition. This inter alia not least for the reason that the respondent company has not controverted the allegation specifically made that its Memorandum of Association does not include as the main or even ancillary and incidental objects, business relating to Solar Energy. Nor does the respondent company has any expertise in the field of Solar Energy having exclusively engaged in the business of dairy since its inception in 1997. Further the consultancy agreement dated 24-7-2010 was signed on behalf of CGEPL by Ajay Pareek, brother of Alok Pareek and Akshay Kumar Bhargava, co-promoter and director with Alok Pareek, on behalf of the respondent company. No explanation has also been forthcoming from the respondent company as to why the bill dated 20-8-2010 bears No.1/2010 for a company doing business since 1997 and why despite consultancy being a service chargeable to Service tax, service tax was not deducted and paid to the government. Also extremely odd and suspicious is that the bill No.1/2010 dated 20-8-2010 for alleged consultancy service by the respondent company to CGEPL was signed by Ajay Pareek, brother



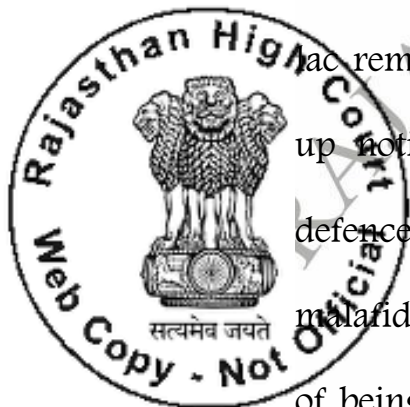
of Alok Pareek and marked attention to his brother Alok Pareek as director of CGEPL—also director in the respondent company.

20. In the facts and evidence on record a case of a debt of Rs.20 lac remaining unpaid to the petitioner company despite a winding up notice to the respondent company has been made out. The defence of the respondent company to the winding up petition is mala fide, convoluted, mutually destructive and palpably false, what of being bonafide and based on substantial grounds making out a triable issue. No iota of public interest against the winding up has even been urged and cannot be found.

21. The petition is therefore allowed.

22. The respondent company M/s. Ask Dairies Private Limited is wound up. The Official Liquidator attached to this Court is appointed as the Liquidator of the respondent company under section 450 of the 1956 Act. The Official Liquidator shall be free to exercise all powers under the Act of 1956 to bring about the earlier dissolution of the respondent company in accordance with law.

23. This winding up order be published by the petitioner in two news papers i.e. The Times of India (English) and Dainik Bhaskar (Hindi) Jaipur Edition in terms of Rule 24 of the Companies (Courts)



Rules, 1959.

24. The Citation be also published in official gazette.
25. All costs to the account of the petitioner company.
26. A copy of this order be supplied to the Official Liquidator.

(Alok Sharma), J.



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All corrections made in the order have been incorporated in the order being emailed.

Arun Kumar Sharma, Private Secretary.



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