

Interactive Media and Communication Solution Priva Vs. Go Airlines Limited

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Court : Delhi

Decided On : Nov-29-2014

Judge : Sanjiv Khanna

Appellant : Interactive Media and Communication Solution Priva

Respondent : Go Airlines Limited

Judgement :

\$~Special Bench *IN THE HIGH COURT OF DELHI AT NEW DELHI +
CO.APP.10/2013 Date of decision:

29. h November, 2014 INTERACTIVE MEDIA AND COMMUNICATION SOLUTION PRIVATE LIMITED. Petitioner Through Mr. Manoj Goel, Mr. Shuvodeep Roy, Mr. Wajeeh Shafiq and Mr. Gopal Verma, Advocates. versus GO AIRLINES LIMITED Respondent Through Mr. Darpan Wadhwa, Mr. Varun Kumar, Ms. Saloni Chowdhary and Mr. Nikhil Singhvi, Advocates. CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE SIDDHARTH MRIDUL SANJIV KHANNA, J.

(ORAL) C.M.No.6218/2014 This is an application for condonation of delay in filing of reply to the review application. The application is allowed as there is no objection from the applicant in the review application. C.M.No.15416/2013 Delay in filing of application for review is condoned as there is no objection from the respondent. We notice that application for review has been filed pursuant to the

liberty granted by the Supreme Page 1 of 8 Court. The application is accordingly allowed. REVIEW APPLICATION4902013 This is an application for review, by the appellant-Interactive Media and Communication Solution Pvt. Ltd. now known as Inoz Digital Pvt. Ltd.

2. The appeal filed by the applicant under Section 483 of the Companies Act, 1956 was dismissed by our decision dated 4 th February, 2013. In the said decision, in paragraphs 10 and 11, we had observed as under:

10. Even if we exclude the entire period between 15 th January, 2011 and 11th 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 12th January, 2009. The period of 3 years, therefore, expired on 12th January, 2012. The appellant at best is entitled to exclusion of 301 days for the period between 15th January, 2011 and 11th November, 2011. The company petition before the Delhi High Court was filed on 30th 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 11th November, 2011, notice under Section 434(1)(a) was issued on 15th 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 Page 2 of 8 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 11th November, 2011 and then notice dated 15th 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 30th 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.

3. The decision dated 4th February, 2013 was made subject matter of challenge before the Supreme Court in Special Leave to Appeal (Civil) No.19476/2013, in which the following order was passed:

Heard learned counsel for the petitioner. The High Court is absolutely right when it observed that as the debt was time barred, winding-up petition could not have been entertained. Learned counsel for the petitioner has submitted that there is some factual mistake in the impugned order. In fact, the debt was not time barred. According Page 3 of 8 to the learned counsel, the said fact was not properly appreciated by the High Court. In that view of the matter, the petitioner seeks leave to withdraw this Special Leave Petition with leave to file Review Petition before the High Court. Permission is granted. The Special Leave Petition is accordingly dismissed as withdrawn. Needless to say, if the Review Petition is filed before the High Court, it will be considered by the High Court in accordance with law and in case, the Review Application is rejected by the High Court, it will be open to the petitioner to approach this court even for challenging the order which has been challenged in this petition.

4. In the application for review, it is stated that as per the agreement on 30th December, 2008, a schedule for payment was agreed upon. As per the schedule, the first instalment of Rs.1,62,360/- was to be cleared by 5th January, 2009, the

second instalment of Rs.1,76,670/- was to be cleared by 9th January, 2009, the third instalment of Rs.11,77,426.50/- was to be cleared by 15th January, 2009 and the last instalment of Rs.11,77,426.50/- was to be cleared by 15th February, 2009. It is the case of the applicant that on 12th January, 2009, payment of Rs.3,39,030/- was received by them towards the first two instalments, but the third and fourth instalments were not paid. The applicant has submitted as under:

The confirmation of the receiving payment of Rs.3,39,030/- from the Respondent Company in Page 4 of 8 adherence of the Payment Schedule was sent through e-mail by Ms. Vrutika to Mr. Narendran of the Respondent Company on 16.1.2009. A true and correct copy of the e-mail dated 16.1.2009 is annexed herewith as Annexure-RP/6. 3.5 That on 15.1.2009, the payment of the 3rd instalment for an amount of Rs.11,77,426.5 lakhs, i.e, 50% of the total remaining due of Rs.23.5 lakhs as per the Payment Schedule fell due. However, the respondent Company defaulted in adhering to the payment schedule for the first time, after paying up for the first two instalments on 12.1.2009. Thus, on 15.1.2009, for the first time, cause of action to proceed against the respondent arose upon respondents default to adhere to the agreed payment schedule of 30.12.2008. Calculated from 15.1.2009, the limitation period of three years was scheduled to expire on 15.1.2012. Adding the exclusion of time of 301 days [under Sec.14(2) of Limitation Act, 1963]. and 21 days [notice period under Section 434 (1)(a) of Companies Act, 1956]., the limitation period would expire on 2.12.2012, whereas the present Company Petition was filed on 30.11.2012 and so was within time in respect of. This factum was pointed out to the Honble Supreme Court during the course of hearing and weighed with the Court while granting liberty to petitioner to prefer the present Review Petition.

5. Thereafter, it is submitted as follows:

3.6 That there were e-mail communications between 9.2.2009 and 13.2.2009 between Ms. Vrutika of the Petitioner Company and Mr. Narendran of the Respondent Company where Mr. Narendran Offered to settle the remaining dues through Air Tickets. The same amounts to a categorical acknowledgment of liability of the Respondent Company towards the Petitioner Company and gives

rise to fresh and independent cause of action and fresh period of Page 5 of 8 limitation begins to run from 13.2.2009 as per the mandate of Section 18(1) of the Limitation Act.

6. Learned counsel for the parties agree, at this stage, that the matter can be remitted to the Company Judge with liberty to the applicant to file an application under Section 14 of the Limitation Act, 1963. We appreciate the consent given by the respondent on the said aspect. We feel that this liberty is required to be given as the Company Petition was listed for first hearing on 7th December, 2011 and came to be dismissed by the Company Court by an order of the same day. It is noticeable that the applicant herein had not filed any application under Section 14 of the Limitation Act, 1963 and we believe that one opportunity should be granted to file the said application and place the facts on record. In fact, the applicant has filed the said application before us and is listed as C.M.No.15417/2013. It would be appropriate, if the applicant herein is given an opportunity to file an application under Section 14 of the Limitation Act before the Company Court and not before us in an appeal for several reasons, including certain facts which are relied upon by them and these facts are disputed and denied by the respondent. Contrasting facts have to be set out in the pleadings and, thereafter, any firm decision can be given. As noticed, the company petition was dismissed on the first date of hearing. Page 6 of 8 7. At this stage, it will be also appropriate to notice the contention of the respondent, who submits that Section 14 of the Limitation Act per se would not be applicable to a winding-up proceedings under the Companies Act, 1956 in relation to a debt which has become time barred and when the civil proceedings for recovery would be time barred. This aspect can be raised by the respondent before the Company Court and it will be open to the applicant to contest the same.

8. In view of the aforesaid position, we recall and review paragraphs 10 and 11 of our decision dated 4 th February, 2013 and permit the applicant to file an application under Section 14 of the Limitation Act, 1963 within a period of two weeks, before the Company Court. The said recall/review will equally and to this extent apply to the final observation in our order dated 4 th February, 2013. The application, when listed, will be taken up for preliminary hearing.

9. We again clarify that the learned counsel for the respondent has no objection to remitting the case to the Company Court with liberty to file an application under Section 14 of the Limitation Act but he contest and submits that Section 14 of the Limitation Act, 1963 would not apply and on merit also no ground is made out to exclude the period. We also clarify that we have not expressed any opinion on whether Section 14 of the Limitation Act, 1963 would apply Page 7 of 8 to a winding-up proceedings initiated under Section 433(e) read with Section 434(1)(e) of the Companies Act, 1956 before another court which for some reason does not have jurisdiction or that on merits itself, a case under Section 14 of the Limitation Act, 1963 is made out.

10. Review application is disposed of. C.M. Nos.15417/2013 and 15418/2013 are also disposed of in terms of the above order. SANJIV KHANNA, J.

SIDDHARTH MRIDUL J.

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