

## Brand Trading (India) Private Limited vs - on 21 July, 2017

**Author: Siddharth Mridul**

**Bench: Siddharth Mridul**

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 27.04.2017

Judgment pronounced on: 21.07.2017

CO. PET. 540/2015

IN THE MATTER OF:

BRAND TRADING (INDIA)

PRIVATE LIMITED

.... Petitioner Company

Through:

Mr. R. Jawahar Lal, Mr. Sanjeev Jain  
& Ms. Naina Duggal, Advocates for  
the Petitioner  
Mr. Mayank Goel, Mr. Lalruatpuia  
Sailo & Mr. Monamshel Maring,  
Advocates for the Official Liquidator  
Ms. Aparna Mudium, Assistant  
Registrar of Companies

JUDGMENT

SIDDHARTH MRIDUL, J.

1. The present petition has been filed by Brand Trading (India) Private Limited (hereinafter referred to as Petitioner Company), under the provisions of Sections 466(1) and 518(1) of the Companies Act, 1956 (hereinafter referred to as 'the Act') read with Rule 9 of the Companies (Court) Rules, 1959, praying as follows:

"a) restore the powers to the management of the affairs of the Petitioner to its board of directors;

b) permit the Liquidator to handover charge of the Petitioner to the directors and to discharge her from proceeding further with the winding up of the Petitioner;

c) pass an order under Section 466(1)/518(1) and other applicable provisions of the Companies Act 1956 for seeking permanent stay of voluntary winding up of the Petitioner;

d) pass such other and further orders as the Court may deem fit, to give effect to the special resolution passed by the shareholders in their Extraordinary General Meeting held on 23rd February, 2015 rescinding the resolution for voluntary winding up and to commence the business of the Petitioner as well as directing the liquidator to hand

over the charge of the Petitioner to its board of directors."

2. The registered office of the Petitioner Company is situated at New Delhi, within the jurisdiction of this Court.

3. The Petitioner Company was originally incorporated under the provisions of the Act on 24.06.2005, under the name and style of Brand Trading (India) Private Limited, with the Registrar of Companies, N.C.T. of Delhi & Haryana at New Delhi.

4. The authorized share capital of the Petitioner Company, as on 31.08.2014 is stated to be Rs.12,00,00,000/- divided into 1,20,00,000 equity shares of Rs.10/- each. The issued, subscribed and paid-up share capital of the Petitioner Company is stated to be Rs.10,000,000/-

divided into 10,00,000 equity shares of Rs.10/- each.

5. Copy of the Memorandum of Association and Articles of Association of the Petitioner Company have been filed and are on record. The audited balance sheets of the Petitioner Company as on 31.08.2014, along with the report of the auditor, have also been filed and the same are on record.

6. The Declaration of solvency was executed and approved by the Board of Directors of the Petitioner Company in their meeting held on 30.10.2014, and the same has been filed with the office of the Registrar of Companies in Form 149, as prescribed under the provisions of section 488 of the Act. The Petitioner Company has passed a special resolution in its Extraordinary General Meeting held on 17.11.2014, for voluntary winding up of the Petitioner Company, whereby, Ms. Seema Khanna was appointed as the Voluntary Liquidator of the Petitioner Company.

7. The Registrar of Companies was informed regarding the appointment of the Voluntary Liquidator of the Petitioner Company by way of Form 152, in compliance with the provisions of Rule 315 of the Companies (Court) Rules, 1959. Further, notice under the provisions of Rule 315 of the Companies (Court) Rules, 1959, was published in the Official Gazette on 20.12.2014; and in two newspapers, namely, 'Business Standard' (English) and 'Business Standard' (Hindi) on 26.11.2014.

8. However, subsequent to the appointment of Ms. Seema Khanna as the Voluntary Liquidator, the Board of Directors of the Petitioner Company is stated to have carried out a reassessment of the affairs of the Petitioner Company. As per the reassessment carried out, the Board of Directors is stated to be of the view that continuation of the Petitioner Company would be more advantageous for the Petitioner Company and its members, inter alia, in view of the spurt in the economy.

9. In this view of the matter, the shareholders of the Petitioner Company in their Extraordinary General Meeting held on 23.02.2015, rescinded the earlier resolution dated 17.11.2014

10. Notice in the present petition seeking permanent stay on the voluntary winding up of the Petitioner Company was issued to the Regional Director, Northern Region and to the Official Liquidator, vide order dated 07.08.2015

11. Pursuant to the notices issued in the present petition, the Official Liquidator has filed a report dated 05.11.2015, stating that the statutory duty and the role of the Official Liquidator, in terms of the provisions of the Act, has not yet commenced and the petition may be decided on its own merits. In other words, the Official Liquidator has not raised any objection to the grant of relief prayed for by way of the present petition.

12. Further, in pursuance to the notice issued in the present petition, the Registrar of Companies, N.C.T. of Delhi and Haryana, has also filed a reply dated 15.01.2016, stating that the Petitioner Company has not filed MGT-14 in respect of the Board resolution passed on 30.10.2014, for voluntary winding up of the Petitioner Company

13. Further, this Court vide order dated 15.01.2016 directed the Registrar of Companies and the Official Liquidator to file a report as regards the affairs of the Petitioner Company, during the period when Ms. Seema Khanna was acting as the Voluntary Liquidator of the Petitioner Company

14. In pursuance to the directions issued by this Court vide said order dated 15.01.2016, the Official Liquidator upon examination of the documents submitted in relation to the affairs of the Petitioner Company by Ms. Seema Khanna, has filed a detailed status report dated 24.02.2016. It has been stated by the Official Liquidator in the said report dated 24.02.2016 that the voluntary winding up of the Petitioner Company is in its initial stage and the Board of Directors had recommended supersession and annulment of the special resolution for commencement of voluntary winding up of the Petitioner Company before basic steps with respect to winding up of the Petitioner Company could be taken.

15. In pursuance to the order of this Court dated 15.01.2016, the Registrar of Companies, N.C.T. of Delhi and Haryana, has also filed a report dated 29.02.2016, wherein the following objections have been raised as regards the affairs of the Petitioner Company:

" 5. In terms of the Rule 313 of the Companies Act, 1956, the company has filed Form No. 149 on 05.11.2014 regarding Members' Voluntary Winding up and Declaration of Solvency embodying a Statement of Assets and Liabilities in pursuance of section 488 of the Companies Act, 1956 declaring that the Company will be able to pay its debts in full, within a period of three years from the commencement of winding up. It appears from the Statement of Assets and Liabilities that as on 31.08.2014, the company had estimated values of Assets of Rs. 1,71,70,579/- over total Liabilities of Rs. 25,37,100/-. Thus, having estimated surplus after paying debts of nearly Rs. 1,46,33,479/-.

6. That the shareholders in an Extraordinary General Meeting (EoGM) held on 17.11.2014 passed resolution for Members' Voluntary Winding Up of the company in terms of provisions of section 484(1) (b) of the Companies Act, 1956.

7. That Smt. Seema Khanna of M/s. Seema Khanna and Associates was appointed Liquidator in the EoGM held on 17.11.2014 and the notice of appointment of liquidator pursuant to section 516 of the Companies Act, 1956 was filed on the MCA -

21 Portal vide form No. 152 on 25.11.2015.

8. That in para 9 of the present petition , the Liquidator has stated inter alia that the Liquidator has not commenced the realization of assets to discharge liabilities; none of the creditors or contributories have been paid any monies out of the assets of the company.

9. That the shareholders, in a subsequent extraordinary general meeting held on 23rd February, 2015, resolved that the Members' Voluntary Winding Up may be withdrawn/stayed and authorized the Liquidator to move the Hon'ble Court with following justification specified in the present petition.

10. That the Statement of Assets and Liabilities filed on the MCA- 21 Portal also supports their claim of having sufficient liquidity on the cash and bank balances over its marginal liabilities. Furthermore, the majority shareholders of the Company are also willing to support the operation of the Company, if regularized.

11. That the Liquidator has made a statement that during the intervening period, there was no disposal of assets of the Company and neither did it carry out any business activity nor commence realization of Assets to discharge liabilities, if any. In support of such statement, the Liquidator has submitted a copy of Profit & Loss Account for the period ending 31.03.2015, Bank Statement of the Company for the period from 17.11.2014 to 23.02.2015 along with Ledger Accounts.

12. That in terms of the provisions of section 553 r /w 554 of the Companies Act, 1956, the Liquidator was to open a special banking account in Scheduled Bank and pay moneys received by her in her capacity into that account and not into any private banking account.

13. That the Bank Statement submitted by the Liquidator reveals that during the period under liquidation, a sum of Rs.

21,79,303/- was deposited in ICICI Bank Limited in the Current Account No. 004605005214 on 22.12.2014.

14. That the Liquidator explained inter alia that the Company was in the process of finalizing the procedure of opening a special bank account designated for the purpose specified under section 553 of the Companies Act, 1956, however, before the procedure for opening a Liquidator's account could be completed, the members of the Company vide their meeting held on February 23, 2015 passed the special resolution for withdrawal of the resolution passed for winding up the affairs of the company. The ICICI Bank account was being operated after discussions with the Liquidator. The FD proceeds were credited by the ICICI Bank Limited into the said account as a part of the instructions mentioned by the Company while creating the FD and it was done in the ordinary course of business.

15. That it is submitted that the money has been retained in the private banking account more than the prescribed period under the provisions of section 552(2) of the Act. Further, the Liquidator has

prima facie failed to give any cogent reason for contravention of the provisions of section 552(2) of the Act as the sum and substance of plea, that before she could have opened an account in a Scheduled Bank the members resolved to revive the Company, is not satisfactory as the resolution was passed after about 60 days.

16. That the Ledger Account of the intervening period shows that one of the directors namely Shri T.V. Raj an drew a salary of Rs. 86,074/- each for the month of November, 2014, December, 2014 and Rs. 1,68,891 for the month of January, 2015.

17. That the Liquidator contended inter alia that Shri Ranjan was appointed as the director of the company 18.08.2008. He was employed by the Company at a position equivalent to a Senior Manager by way of an employment agreement dated 01.01.2009 and continued to draw his salary in terms of his employment agreement.

18. That the contention of the Company appears to be satisfactory to the extent that the payment of salary was as per the employment agreement, however, it is not understood how and why, while the Company was under the process of Voluntary Winding Up the salary of Shri Rajan was increased to almost double that of the previous month i.e. December, 2014. The liquidator has also not commented upon the hike of his salary in the month of January, 2015.

19. That as per Section 491 of the Companies Act, 1956, all the powers of the Board of directors and of the managing director or whole- time director and manager shall cease, except for the purpose of giving notice of such appointment to the Registrar in pursuance of section 493 or insofar as the company in general meeting or the liquidator may sanction the continuance thereof.

20. That the copy of the Balance Sheet as at 31.03.2015 furnished by the Liquidator shows that it was signed by Shri Subhash Chand Nagpal and Shri T.V. Rajan as directors of the company on 04.09.2015.

It has nowhere been clarified by the Liquidator if in regard to the continuation of Shri. Rajan and Shri Nagpal's employment during the period the company was in Voluntary Liquidation (17.11.2014 to 23.02.2015), resolutions, if any, of general meeting of the company, were passed or any other permission/sanction was obtained in this regard."

16. In response to the objections raised by the Registrar of Companies, N.C.T. of Delhi and Haryana, in its report dated 29.02.2016, Ms. Seema Khanna, Voluntary Liquidator of the Petitioner Company, has filed an affidavit dated 15.03.2016 on behalf of the Petitioner Company. The relevant portions of the said affidavit dated 15.03.2016, are extracted herein below:

" 2.8 That it is submitted that the Petitioner Company has not carried any operations during the intervening period (i.e. 17th November 2014 to 23rd February 2015) and continues in this position even a on date. That the Petitioner Company only receives interest income from banks since it maintains the surplus funds in its bank. Such interest income has been received by the Petitioner Company in the ordinary Course

of business and not by undertaking any operations.

2.9 I am advised and accordingly state that unless specifically adverted or admitted to in the above factual background, the contents of the RoC Report are statements of fact and the above submissions may be read as part and parcel of the Petitioner Company's para wise reply to the RoC Report below and therefore not being repeated below for the sake of brevity. I state that:

2.9.1 Paragraphs No. 1 to 12 of the RoC Report are statements of facts and do not merit any reply. 2.9.2 That at Paragraphs 13 and 14 of the RoC Report, the Registrar of Companies states that the statements submitted by the Company Liquidator revealed that while the intervening period, (i.e. from 17th November 2014 to 23rd February 2015) a sum of Rs. 21,79,303/-

was deposited on 22nd December 2014 in the Current Account No. 004605005214 maintained by the Petitioner Company with ICICI Bank Limited. That it is submitted that the amount of Rs. 21,79,303/- credited into the above Bank Account were the maturity proceeds of the fixed deposit created by the Petitioner Company with ICICI Bank Limited prior to commencement of winding up of the affairs of the Petitioner Company. Since the Petitioner Company was still under the discussions of opening a Special Bank Account under Section 553 of the Companies Act, 1956, these proceeds were deposited in the Current Bank Account No. 004605005214 maintained with ICICI Bank Ltd. as per the instructions given at the time of creation of the fixed deposit.

2.9.3 That at Paragraphs 15 of the RoC Report, the Registrar of Companies, NCT of Delhi and Haryana has pointed out that money has been retained by the Company Liquidator in a private banking account for a period excess of the prescribed period mentioned under Section 552(2) of the Companies Act 1956. It is clarified that subsequent to passing of the Special Resolution by the Members of the Company on 17th November, 2014, the Petitioner Company was in the process of complying with the provisions of Section 553 of the Companies Act, 1956. While the Petitioner Company and the Company Liquidator had complied with other procedural compliances i.e. newspaper advertisements, publication in the official gazette, the Company Liquidator was in the process of opening a special bank account designated for the purposes specified under Section 553 of the Companies Act, 1956. However, before the procedures for opening a Liquidator's account could be completed, the members of the Company vide their meeting held on 23.02.2015 passed the special resolution for withdrawal of the resolution passed for winding up the affairs of the Company. It is further submitted that the ICICI Bank Account No. 004605005214 was being operated after discussions with the Company Liquidator. As noted in the RoC Report, there maturity proceeds were credited into the Petitioner Company's account in the ordinary course of business.

2.9.4 That under Paragraphs 16, 17 and 18 of the RoC Report, the Registrar of Companies, NCT of Delhi and Haryana has stated that the ledger account of the Petitioner Company shows that one of the Director namely Shri T.V. Rajan drew a salary of Rs. 86,074/- each for the month of November, 2014, December, 2014 and Rs. 1,68,891/- for the month of January 2015. The Registrar of Companies, NCT of Delhi and Haryana has pointed out that there was no clarity on the reasons for

the salary of Mr. T.V. Rajan becoming double in January 2015. It is clarified that Mr. T.V. Rajan was paid salary during the intervening period of the winding up in terms of his employment with the Petitioner Company. That the sum of Rs. 1,68,891/- paid to Mr. T.V. Rajan in January 2015 includes a one- time ex-gratia payment paid by the Petitioner Company to its employees every year in accordance with its policies. It is further submitted that similar ex-gratia payments have been paid to Mr. T.V. Rajan in financial year 2013-14 as well. Extracts of the Salary Register for Financial years 2013-14 and 2014-15 and corresponding bank statements of the Petitioner Company evidencing the payment of such ex-gratia payments are annexed and marked as Annexure A-1. 2.9.5 That Paragraphs 19 and 20 the RoC Report states that in terms of Section 491 of the Companies Act, 1956 all powers of the Board and Managing Director or Whole- time Director and Mangers shall cease, except for the purpose of giving notice of such appointment to the Registrar of Companies in pursuance of Section 493 of the Companies Act, 1956 or insofar as the Company in general meeting or the Liquidator may sanction the continuance thereof. That it has been further stated under Paragraph 20 the RoC Report that the copy of the balance sheet as at 31st March 2015 furnished by the Company Liquidator was signed by Mr. Subhash Chand Nagpal and Mr. T.V. Ranjan as Directors of the Company on 04th September 2015. It has been further stated in the RoC Report that the Company Liquidator has not clarified whether the employment of Mr. T.V. Ranjan and Mr. Subhash Chand Nagpal, during the intervening period between 17th November 2014 and 23rd February 2015, was authorized by the shareholders or any other permissions/authorizations were received in this regard.

2.10 It is clarified that the Company Liquidator had issued an Authority Letter dated 18th November 2014 that authorized Mr. Subhash Chand Nagpal and Mr. T.V. Rajan to handle certain day-to-day affairs of the Petitioner Company in consultation with the Company Liquidator. It is submitted that, in particular, Mr. T.V. Rajan and Mr. Subhash Chand Nagpal, being directors of the Petitioner Company immediately preceding the commencement of winding up of affairs of the Petitioner Company, were authorized to handle the audit of accounts and sign the balance sheet and related documents for the year ending 31st March 2015 on behalf of the Liquidator. That in terms of Section 493 of the Companies Act 1956, the Company Liquidator has the powers to sanction the continuance of certain powers of the board of directors. Therefore, in the instant case, the Company Liquidator had sanctioned certain limited powers to the directors present in India to carry out the day to day activities of the Petitioner Company in consultation with the Company Liquidator. A copy of the above letter of authority is attached hereto and marked as Annexure A-2. It may be noted that such letter has been filed with the Official Liquidator in response to the clarifications sought by the Official Liquidator."

17. In view of the said affidavit dated 15.03.2016, filed on behalf of the Petitioner Company, the objections raised by the Registrar of Companies, N.C.T. of Delhi and Haryana, in its report dated 29.02.2016, stand satisfied. In other words, no further objection remains as regards the Registrar of Companies for the grant of the relief prayed for in the present petition.

18. Before I proceed to deal with the relief prayed for in the present petition, it would be profitable to extract the provisions of sections 466 and 518 of the Act, which read as follows:

"466. Power of Tribunal to stay winding up.--(1) The Tribunal may at any time after making a winding up order, on the application either of the Official Liquidator or of any creditor or contributory, and on proof to the satisfaction of the Tribunal that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Tribunal thinks fit.

(2) On any application under this section, the Tribunal may, before making an order, require the Official Liquidator to furnish to the Tribunal a report with respect to any facts or matters which are in his opinion relevant to the application.

(3) A copy of every order made under this section shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the Registrar, who shall make a minute of the order in his books relating to the company.

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518. Power to apply to Tribunal to have questions determined or powers exercised.--(1) The liquidator or any contributory or creditor may apply to the Tribunal,--

(a) to determine any question arising in the winding up of a company; or

(b) to exercise, as respects the enforcing of calls, the staying of proceedings or any other matter, all or any of the powers which the Tribunal might exercise if the company were being wound up by the Tribunal.

(2) The liquidator or any creditor or contributory may apply to the Tribunal for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up. (3) The Tribunal, if satisfied on an application under sub-section (1) or sub-section (2) that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

(4) A copy of an order staying the proceedings in the winding up, made by virtue of this section, shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the Registrar, who shall make a minute of the order in his books relating to the company."

19. In this behalf, in *S.P. Sood vs. The Registrar of Companies, Delhi*, reported as 1978 (48) CompCas 98 (Delhi), a Coordinate Bench of this Court whilst dealing with the issue as regards the power of the Court to bring a voluntary winding up to an end, observed as follows:



"(3) The main controversy in the case turns on whether the Court has power to stay a voluntary winding up. The power of the Court in relation to a winding up order passed by itself is contained in Section 466 of the Companies Act, 1956, which gives power to the Court on an application either of the Official Liquidator or a creditor or a contributory to pass an order staying the proceedings either altogether or for a limited time. If the present winding up was the result of a winding up order passed by the Court, there would be no doubt that the Court would have jurisdiction. For the purposes of submitting that the Court has a similar power in relation to a voluntary winding up, the petitioner relies on Section 518 of the Act. Sub-section (1) of that Section reads:

"518(1). The Liquidator or any contributory or creditor may. apply to the Court- (a) to determine any question arising in the winding up of a company ; or (b) to exercise, as respects the enforcing of calls, the staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court."

The wide language in which this provision is framed, seems to suggest that the powers of the Court in relation to winding up proceedings, which are exercisable while a company is being wound up by the Court, can also be exercised in the course of voluntary winding up. The submission, of the petitioner is emphasised by the terms of Sub-section (5) of this Section, which reads :-

" A copy of an order staying the proceedings in the winding up made by virtue of this section, shall forth-will be forwarded by the company, "or otherwise as may be prescribed, to the Registrar, who shall make a minute of the order in his books relating to the company."

Thus, the question for consideration is whether the power to stay the winding up exercisable under Section 466 in relation to companies being wound up by the Court can also be exercised when a company is in voluntary winding up. I find that the position taken up by the petitioner is consistent with a large number of reported case.

In Punjab Co-operative Bank, Ltd. Air 1919 Lah 305 (1), it was held under the old Act that the Court could stay a voluntary winding up. In the matter of East India Cotton Mills Ltd. Air 1949, Calcutta 69 (2), S.R. Dass J. (as he then was) examined the principles on which a stay of winding up could be ordered and found that it was analogous to the jurisdiction exercised while rescinding a receiving order or annulling an adjudication in bankruptcy. There are some English cases also in which a voluntary winding up was stayed. Examples of those are : In re :

South Barrule Slate quarry Co. (1869) 8 EC 688 (3), re : Titian Steamship Co. (1888) W.N. 17 and many other cases. It has been held in such cases that mere consent of the parties is not enough but the Court should consider all the circumstances. A leading judgment on the principle on which the Court should act while ordering stay is in re : Telescript or Syndicate, Limited, (1903) 2 Ch. D 174 In that case, the Court detailed

various points for and against ordering a stay of the winding up and decided that there was no ground for staying the winding up on the facts as they were. The Court, however, observed that at a later date, the Official Receiver could report whether all the liabilities and creditors and contributories had been settled and the debts had been paid and whether the members were prepared to reduce their share capital by surrendering and cancelling their bonus shares, then the Court would 'as at present advised be prepared a stay the proceedings in the winding up'. Thus, there is no doubt that the Court does possess the power to stay a winding up even when it is a case of voluntary winding up. There must, however, be facts justifying the stay. The words used in Section 466 are : "on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed." Thus, I have got to find from the facts whether this is a case where the winding up ought to be stayed or whether it is a case where the company should be finally wound up.

(Emphasis supplied)"

20. On a conjoint reading of the aforesaid provisions and the decision of this Court in S.P. Sood (supra), it is made clear that the power of Court under the provisions of Section 466 of the Act, to stay the winding up proceedings in relation to Companies being wound up by the Court, can also be exercised when a company is undergoing voluntary winding up, in the event the facts and circumstances of the case warrant stay of the voluntary winding up proceedings.

21. In the present case, the Petitioner Company is stated to have sufficient funds with comparatively negligible liabilities, in order to continue the business operations of the Petitioner Company. Further, it has been stated that the primary shareholder of the Petitioner Company, Btindia Ltd., holding more than 99% of the share-capital of the former, is willing to support the Petitioner Company once the Petitioner Company revives its business operations.

22. Furthermore, the voluntary winding up of the Petitioner Company being in its initial stage; and in view of the satisfaction accorded by the Official Liquidator and the Registrar of Companies, there appears to be no impediment to allow the relief prayed for by way of the present petition.

23. Consequently, the voluntary winding up proceedings of the Petitioner Company are stayed altogether. The Directors of the Petitioner Company shall be restored with the power of managing the affairs of the Petitioner Company, and the Voluntary Liquidator shall handover the charge of the Petitioner Company to its Directors. The Voluntary Liquidator, Ms. Seema Khanna, stands discharged qua the voluntary winding up proceedings of the Petitioner Company.

24. The order shall be communicated to the Registrar of Companies by the Petitioner Company within 30(thirty) days of its receipt.

25. No order as to costs.

26. The Petition is allowed and disposed of accordingly.

SIDDHARTH MRIDUL, J.

JULY 21, 2017 dn/ap