

ORDER SHEET

THE HIGH COURT OF SINDH AT KARACHI

J.C.M. No. 23 of 2019

Fortech Construction (Pvt) Limited v National Beverage (Pvt) Limited & another

DATE

ORDER WITH SIGNATURE OF JUDGE

For orders on CMA No.202 /2019 (if granted)

13.09.2019

Mr. Imdad Khan, Advocate for Plaintiff

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Urgent application has been filed which is granted. Pursuant to order dated 22.08.2019, Counsel for the Petitioner has filed a statement dated 11.09.2019 along with copies of order(s) passed by the Executing Court of 1st Senior Civil Judge, Karachi West, dated 25.11.2017 in Execution No.16/2003 and by the Additional District Judge-IV, Karachi West dated 9.1.2018 in Civil Revision No.63/2017, whereby, the Petitioner has been unsuccessful in getting the execution satisfied against the Respondent Company. This is a Petition under Section 94 of the Companies Act, 2017 and the Petitioner has come up before this Court for seeking the following reliefs:-

- “1. To call R & P of the JM. 27/1997 which was disposed of on 13.03.1998 from the record room and declare that Officers of the Respondent No.1 had reduced its share capital through concealment and misrepresentation about creditors of the company (during pending suit), and direct the officers of the Respondent No.1 to settle the credit/amount as per judgment and decree dated 13.05.2003 in Suit No.41/2003 (old Suit No.615/1992) to the petitioner with interest and cost already granted till date.
2. To direct the officers/directors of the Respondent No.1 to appear before this hon'ble court and make such orders against them as to punish for their concealment and misrepresentation before this Hon'ble Court during proceeding in JM.27/1997
3. To direct the Respondent NO.2 to produce all relevant record of the Respondent No.1 as to compliance of provisions of company law relating to reduction of share capital.

3. Any other relief as this Honorable Court may deem fit and proper under the circumstances of the case
1. Award of the cost"

Counsel for the Petitioner was at the very outset confronted on the last date of hearing as well as today as to maintainability of this J.C.M. through which Petitioner seeks recalling and or modification of order dated 13.03.1998, (and as a consequence thereof, recovery / satisfaction of a money decree obtained against Respondents) whereby, while allowing the J.M. 27/1997 the share capital of Respondents Company was ordered to be reduced, and learned Counsel has referred to Section 94 *ibid* and submits that the Petitioner's case falls within the proviso to Sub-Section (1) of Section 94; hence, notwithstanding the delay and the grant of the said petition, instant J.C.M is maintainable. .

I have heard the learned Counsel and perused the record. It appears that Respondent Company had filed JM No.27/1997 under Sections 96 and 97 of the Companies Ordinance, 1984 (since repealed) for reduction of its share capital and vide order dated 13.03.1998, the said Petition was allowed after fulfillment of all requirements as per the provisions of the Companies Ordinance, 1984 and the Companies (Court) Rules, 1997. It further appears that the Petitioner after having failed in getting the money decree's execution satisfied has come before this Court by seeking the above relief. Section 94 *ibid* reads as under;

94. Liability of members in respect of reduced shares.—(1) A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference, if any, between the amount paid, or, as the case may be, the received amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the order:

Provided that, *if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital*, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim, then-

(a) every person who was a member of the company at the date of the registration of the order for reduction shall be liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and

(b) if the company is wound up, the Court on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall effect the rights of the contributories among themselves. **(Emphasis supplied)**

On perusal of Section 94 as above, it appears that though the provisions stipulates that *if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital*, is, by reason of his ignorance of the proceedings for reduction, and after reduction, if the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court to pay amount of his debt or claim, then every person who was a member of company at the date of the registration of the order for reduction can be held liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute, if the company had commenced to be wound up on the day before that registration. It does not appear to be in dispute that the petitioner never came before the Court at the time of passing of the impugned order of reduction in share capital. Admittedly, the decree in favour of the Petitioner was passed somewhere in 2003, whereas, order for reduction of share capital was passed in the year 1998 and in my view the Petitioner not a creditor within the contemplation of the Companies Ordinance, 1984, at the relevant time to invoke any such provision(s) including Section 94 *ibid*. The law as above clearly

provides that the creditor, if any, must be entitled to object to reduction of share capital in respect of any debt or claim; however, at the relevant time, the petitioner was not a creditor *stricto sensu*, hence, not entitled, and for that matter could not have objected to such reduction of capital.

Moreover, the reduction in share capital and the order thereof has been passed by the Court after fulfillment all the legal requirements as provided under the Companies Ordinance, 1994 and the Companies (Court) Rules 1997 including publication of such intention of reduction of share capital in at least two (02) newspapers as well as being notified in the Gazette of Pakistan and therefore, the Petitioner otherwise could not at this stage of the proceedings can claim ignorance from such proceedings. And this is so because the Petitioner admittedly was pursuing its case against the Respondent Company and therefore, ought to have been vigilant; rather has been found to be vigilant in pursuing the Suit by getting a money decree and thereafter seeking its execution; but never approached this Court. In that situation the Petitioner ought to have kept the track of the Company and its activities, including any attempt of winding up or reduction of any share capital.

In view of hereinabove facts and circumstances of this case, I am of the view that no case is made out on behalf of the Petitioner as this J.C.M. is misconceived and cannot be entertained by this Court at this stage of the proceedings. Accordingly, the same stands dismissed with pending applications in *limine*

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