
(2003) 02 MAD CK 0141

In the Madras High Court

Case No : Company Petition No. 247 of 2001

Allahabad Bank

APPELLANT

Vs

Kothari Petrochemicals Ltd.

RESPONDENT

Date of Decision : 04-02-2003

Acts Referred:

Companies Act, 1956 — Section 433, 434, 443, 443(2)

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 34

Citation : (2005) 128 CompCas 402

Hon'ble Judges : A. Ramamurthi, J

Bench : Single Bench

Advocate : P. Raghunathan, for T. S. Gopalan and Co, for the Appellant; Krishna Srinivas, for S. Ramasubramanian and Associates, for the Respondent

Final Decision : Dismissed

Judgement

A. Ramamurthi, J.—Company petition filed u/s 433(e) read with Section 434(1a) and (1b) of the Companies Act, to wind up the respondent-company.

2. The case in brief is as follows : The respondent-company is promoted by M/s. Kothari Sugars and Chemicals Limited and the group has interest

in sugar, petrochemicals, industrial alcohol, bio-technology, mutual funds, financial services, international trading, safe deposits lockers, etc. The

respondent set up a factory at Melavanjoore Village near Karaikal to manufacture caustic soda, chlorine and hydrogen. During October 1997, the

respondent approached the applicant-bank for sanction of a term loan of Rs. 400 lakhs. The respondent had already taken a loan of Rs. 500 lakhs

from M/s. Reliance Capital Limited and applied the same towards purchase of project and other fixed assets and other pre-operative expenses.

The said loan had become due and carried a very high rate of interest. The purpose of applying for a loan from the applicant was to repay the said high interest loan from M/s. Reliance Capital Limited. Their plant had already commenced commercial production and the prospects for the business were very bright. The respondent offered to secure the due repayment of the principal amount of the loan, instalments and interest thereon by mortgage of their factory, land and building near Karaikal and hypothecation of all fixed assets. The security so created would rank without any preference or priority and equally with the loans granted by M/s. ICICI and South Indian Bank, which were then outstanding. The applicant considered the proposal and sanctioned term loan of Rs. 400 lakhs carrying interest at 17.5 per cent, per annum compounded quarterly. Though the loan was sanctioned on March 18, 1998, the respondent did not create the security stipulated till May, 1998. On May 15, 1998, the petitioner disbursed the loan amount to the respondent and security documents were also executed. Right from the beginning, the petitioner was not prompt in keeping the commitments. The respondent wanted the petitioner to shift repayment of the first instalment of the loan to September, 1998. The petitioner agreed for the same ; but the respondent defaulted to pay the loan instalments due from December, 1998. The petitioner demanded payment of the instalments. Instead of clearing the dues, a letter seeking for reduction of interest to 15 per cent, and deferment of payment of loan instalments till December, 1999, was sought for.

3. In spite of continuous defaults, the petitioner obliged the respondent and modified the terms and conditions and sanctioned a rehabilitation package. On January 27, 2000, the petitioner issued a letter to the respondent rescheduling the term loan. The petitioner agreed to treat whatever payment had been towards repayment of principal as towards the interest then outstanding and due. The petitioner also gave time to the respondent to commence repayment of the loan from April, 2001, instead of earlier agreed as June, 1998. The petitioner also reduced the interest rate from 17.5 per cent, per annum to 16 per cent, per annum with quarterly rests. Once again the respondent broke the rehabilitation agreement and failed to pay interest. The respondent attributed the defaults to low demand and weak prices for the primary products and also adverse market

conditions. The petitioner sent letters and reminders to make payment. The respondent sent a letter dated August 21, 2000, calling upon the petitioner to accept the proposal for settlement. The respondent proposed that they would pay 25 per cent, of the principal loan, i.e., rupees one crore and the balance of Rs. 3 crores in four years from the date of acceptance of proposal. They also demanded that the petitioner should not charge interest on the amount of Rs. 3 crores. The petitioner considered the proposal and sought for clarification. On April 19, 2001, the petitioner sent a letter to the respondent asking them to improve their offer and make payment of the overdue interest, but the respondent failed to comply with the same. The respondent had incurred losses continuously since 1997-98 and had an accumulated huge loss of Rs. 15 crores and odd. The respondent had not kept up its commitments despite rehabilitation and was clamouring for more sacrifices which the petitioner unlike ICICI Limited could ill afford. The enquiries revealed that the respondent is trying to make payments to chosen creditors. On August 17, 2001, the respondent owed a sum of Rs. 4 crores and odd. A statutory notice has been sent by the petitioner and the respondent sent a reply about the liability, but falsely denied that the petitioner rescheduled the loan for their benefit. The petitioner had already declined the said offer as the same involved huge sacrifice of public money. The respondents have thus far failed to come out with a reasonable offer. The economic prospects for a turn around are bleak. The respondent is unable to pay the debt and hence the petition.

4. The respondent filed a counter-affidavit and denied the various averments. The respondent approached the petitioner for a loan of Rs. 400 lakhs and it was sanctioned. The security and the mortgage was created on May 15, 1998. The loan was to be repaid in 20 quarterly instalments of Rs. 20 lakhs spread over 60 months beginning from June 1998, as per the terms of the loan. They requested the petitioner to shift the repayment of the first loan instalment to September, 1998, and it was agreed. Due to recession in the market and low price of caustic soda, the respondent requested the petitioner by a letter dated September 28, 1999, to reduce the interest to 15 per cent, and deferment of loan till March, 2001. It was accepted by the petitioner and the payment of loan was to commence from April, 2001, at the interest of 16.5 per cent. The two instalments

paid were adjusted against interest. The continued recession in the industry made its impact on the respondent-company by resulting in loss. As a result, the respondent sent a proposal for a one-time settlement on the same terms as stipulated to the other lenders such as ICICI and South Indian Bank. The one-time settlement offered was to pay 35 per cent, of the principal loan amount and the balance over a period of 36 months as monthly instalments bearing nil rate of interest. The petitioner rejected the proposal on the ground that the loan was sanctioned to replace a high interest loan and no further reduction in interest was possible. The petitioner issued a statutory notice and for which reply was sent and as per the recent circular issued by the Reserve Bank of India on Corporate Debit Restructuring if 75 per cent, of the borrower's creditors came to an agreement on the mode of settlement, the same would be binding on the remaining secured creditors. There was no misrepresentation as to the performance of the respondent-company. The respondent by its letter dated September 28, 1999, requested for a reduction of the interest rate and deferment of payment of loan instalments till December, 1999, and the same was sanctioned by the petitioner. ICICI and South Indian Bank who contribute to 85 per cent, of the respondent's creditors have accepted the settlement package. The petitioner should have also accepted the settlement as accepted by the other creditors. The petitioner has filed this company petition with the sole intention of extracting money which will upset the apple cart and thereby causing hindrance to the restructuring plan. The respondent had created proper security and there was no suppression of material facts. The petitioner has also chosen to reject the package and approached this Court for winding up the company. The company is able to sell its products and an increase in the prices would bring about a considerable improvement in the company's fiscal position. The respondents have made payments to the ICICI and the South Indian Bank in keeping with the settlement, the excise duty and sales tax. The respondent is already on the road to recovery and an order of winding up will severely hamper the progress efforts made by them. It has fixed assets worth Rs. 46.35 crores and it employs 79 staff and workmen. The company's performance is improving year by year and no case is made up to wind up as well and the application is liable to be dismissed.

5. Heard learned Counsel for the parties.

6. The points that arise for consideration are--

(1) Whether the petitioner had made out a case to admit the company petition ?

(2) Whether the objections raised by the respondent are sustain-able ?

(3) To what relief ?

7. Points : The petitioner Allahabad Bank, Mount Road Branch, Chennai has filed this petition to wind up the respondent-company on the ground

that they are unable to pay the debts. There is no dispute that the respondent approached the petitioner-bank and they have also sanctioned term

loan of Rs. 400 lakhs as per the terms and conditions entered into between the parties. It is also not in dispute that this loan had been availed of by

the respondent-company to discharge their earlier loan taken from M/s. Reliance Capitals Limited. The loan was sanctioned on March 18, 1998,

carrying interest at the rate of 17.5 per cent, per annum. The respondent also hypothecated all the movable property of every kind including stocks

of raw materials. The respondent wanted the petitioner to shift repayment of the first instalment of the loan to September, 1998, and it was also

agreed. The petitioner demanded the loan by the letter dated June 15, 1999, but the respondent sent a letter seeking for reduction of interest rate to

15 per cent, and also for deferment of loan instalments till December, 1999. On January 27, 2000, the petitioner issued a letter to the respondent

rescheduling the term loan. The petitioner also reduced the rate of interest to 16 per cent, per annum with quarterly rests. But the respondent failed

to pay interest. The respondent again sent a letter dated August 21, 2000, calling the petitioner to accept the proposal for settlement that they

would pay 25 per cent, of the principal amount, namely, rupees one crore and the balance of Rs. 3 crores will be paid in a period of four years

without any interest. It was not accepted by the petitioner which directed the respondent to improve their offer. The respondent had not kept up its

commitment despite rehabilitation and as on August 17, 2001, the respondent owed a sum of Rs. 4 crores and odd. Statutory notice was also

issued and for which, the respondent sent a reply admitting the liability but have denied that the petitioner rescheduled the loan.

8. The respondent admitted the sanction of loan by the petitioner-bank, but would contend that due to recession in the industry, the instalments

could not be paid in time. It is further stated that they have borrowed a sum of Rs. 25 crores from the ICICI, Rs. 4 crores from South Indian Bank and Rs. 4 crores from the petitioner-bank. Major loan was taken from the other two banks and the ICICI was the referred bank to avail of the claim of corporate/debt rehabilitation. It was agreed by the other two banks that they were prepared to accept 25 per cent, of the principal amount and the balance of principal has to be paid in a period of four years. The same proposal was given to the petitioner-bank also to pay rupees one crore for down payment and the balance of Rs. 3 crores would be paid in a period of four years without any interest. The only intention of the petitioner-bank is to wind up the respondent-company and put them in trouble. The respondent-company has got assets worth more than Rs. 46 crores and there are about 79 staff working under them. Since it is a growing and running concern, any order of winding up would affect the position of the company as well as the employees. Moreover, the petitioner is a secured creditor and they can always avail of the remedy under the alternative forum, namely, to initiate proceedings before the Debt Recovery Tribunal and claim the amount. The balance-sheet of the respondent-company would clearly indicate that it is not a commercially insolvent company. Learned counsel also placed reliance upon Sub-section (2) of Section 443 of the Companies Act.

9. Learned counsel for the petitioner-bank contended that the debt payable to the petitioner-bank is admitted in various correspondence and there are enough materials to come to a conclusion that the respondent-company is unable to clear the debt. Even assuming that the ICICI as well as South Indian Bank had accepted the offer given by the respondent-company, the petitioner-bank cannot be compelled to accept the same. The respondent-company had already borrowed nearly Rs. 5 crores from M/s. Reliance Capitals Limited with a higher rate of interest and only to discharge the loan it was availed of the petitioner-bank. Moreover, the petitioner-bank is a nationalised bank and if they agreed to receive the principal without interest, naturally the public would suffer. The alleged recession in the market is prevailing everywhere ; but however, the respondent-company has no right whatsoever to choose the creditors and pay the amounts.

10. It is admitted that the petitioner-bank issued the statutory notice dated August 17, 2001. The respondent-company also sent a reply dated September 8, 2001. The Guidelines of the Reserve Bank of India regarding Corporate Debt Restructuring (CDR) also have been filed. It will apply only to multiple banking accounts/syndicates/consortium accounts with outstanding exposure of Rs. 20 crores and above with the banks and financial institutions. The legal basis to the CDR mechanism shall be provided by the Debtor-Creditor Agreement and the Inter-Creditor Agreement. The debtors shall have to accede to the debtor-creditor agreement, either at the time of original loan documentation or at the time of reference to Corporate Debt Restructuring Cell. Similarly, all participants in the CDR mechanism through their membership of the Standing Forum shall have to enter into a legally binding agreement, with necessary enforcement and penal clauses, to operate the system through laid-down policies and guidelines. On June 21, 2000, the restructuring proposal was given by the ICICI Bank not only to the petitioner-bank but also to South Indian Bank and State Bank of India. The respondent-company gave the proposal to the petitioner-bank on August 21, 2000, and further proposal was also given on October 17, 2001. The petitioner sent a reply on October 29, 2001, and requested them to improve upon the offer and it is pertinent to state that the offer was not rejected. At the same time, the proposal given by the respondent to the ICICI as well as the South Indian Bank has been accepted. The CDR pertaining to the respondent itself clearly indicates that the referred bank as well as lead bank is only the ICICI Bank. Based upon the fact that more than 85 per cent. of the amount was availed of from the aforesaid two banks and when they have agreed for restructuring of the loan under the CDR Scheme, according to learned Counsel, the petitioner-bank is bound by the same. Moreover, in pursuance of the settlement entered into between the two banks, the respondent-company has made payment of Rs. 5 crores as down payment to ICICI and the sum of rupees one crore to the South Indian Bank and the position statement as on March 31, 2002, clearly establish the same.

11. Learned counsel for the petitioner relied on the decision reported in Bharat Overseas Bank Ltd. Vs. Shree Arcee Steels P. Ltd., , wherein it has been held as follows (headnote) :

The company court is not justified in dismissing a petition for the winding up of a company at the stage of admission on the ground that the

petitioner is a secured creditor. The petition is required to be admitted and advertised and it is at that stage that the court could go into the question

as to whether the security is sufficient or not and exercise its discretion to accept the petitioning creditor's claims and requesting for winding up or

to reject the same on judicial consideration.

12. Reliance is also placed on Sree Shanmugar Mills Ltd., by Managing Agents Sri Alagai Ltd. Vs. S.K. Dharmaraja Nadar and Another, , as

follows (headnote of AIR 1970 Mad) :

The test of inability to pay the debt u/s 433(e) was not whether the company, if it converted all its assets into cash, would be able to discharge its

debts, but whether in a commercial sense the existing liabilities could be paid by it while it continued to carry on as a company. Therefore, the

company must be considered unable to pay its debts within the meaning of the above provisions.

13. There is no dispute about the principles ; but the applicability of the same depends upon the facts and circumstances in each case.

14. Learned counsel for the respondent relied on Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., , that the principles

on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in

point of law and, thirdly the company adduces prima facie proof of the facts on which the defence depends.

15. Reliance is also placed on In Re: Rishi Enterprises, as follows (headnote) :

A company which is a running company employing about 500 employees who are paid their wages regularly and which does business of crores of

rupees every year cannot be brought to a halt on the basis of petitions for winding up the company u/s 433(e) of the Companies Act, 1956, merely

because it is in some financial difficulty at the moment. On the contrary, even in those cases where the company is closed, it has been laid down

that it is the duty of the court to welcome revival rather than affirm the death of the company. It has been also held that it would not be right to say

that creditors can insist on winding up of the company by the court as a matter of right if the position of the company is such that it would be unable

to pay its debts to them even if the company can be resurrected.

16. It has been held in *American Express Bank Ltd. Vs. Core Health Care Ltd.*, , wherein it has been observed as follows (headnote) :

By complying with the provisions of Section 434 of the Companies Act, 1956, the issuance of notice is not a matter of course. If from the material

disclosed in the petition and reply to the notice, a prima facie case of existence of a bona fide and reasonable dispute is spelt out, the court would

be justified in dismissing the petition in limine at the threshold . . . The court must in each case exercise its discretion in deciding whether in the

circumstances of the case, it would be in the interest of justice to wind up the company.

17. The same view has been reiterated in *Canara Bank Vs. Arihant Industries Ltd.*, also.

18. It has been held in *Allahabad Bank Vs. Canara Bank and Another*, that (headnote of 101 Comp Cas 64) : ""Alternatively, the Companies Act,

1956, and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB) can both be treated as special laws, and the principle

that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act, giving it

overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, Section 34. Therefore, in view of Section 34 of the RDB

Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts"".

19. Sub-section (2) of Section 443 reads as follows :

Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an

order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to

have the company wound up instead of pursuing that other remedy.

20. It is clear from the aforesaid Section that the court may refuse to make an order of winding up, if it is of opinion that some other remedy is

available to the petitioner and that they are acting unreasonably, I am of view that it is applicable to the case on hand. As adverted to, ICICI Bank

and South Indian Bank, who are the major lenders to the extent of 85 per cent., have agreed to the CDR Scheme and they have also received the

payments ; but the petitioner-bank is not willing to agree to the CDR Scheme. There is an alternative remedy available and the petitioner-bank can invoke the provisions of the RDB Act and take steps to recover the amount through the Debts Recovery Tribunal. The petitioner-bank is only a secured creditor and there is no material to show that the security is also diluted. When the alternative remedy is available to the petitioner-bank, it can proceed before the Tribunal for recovery of the amount and I am of the view that it is not just and equitable to wind up the company. If the company petition is admitted and publication is effected, naturally the major lenders, who had agreed for rehabilitation, also would be affected and the workers in the company also would be very much affected. It is not a fit case to admit the company petition and ultimately make the working company as a closed one. Hence, I am of the view that the petitioner-bank has not made out a prima facie case for admission of the company petition and the points are answered accordingly.

21. For the reasons stated above, the company petition fails and is dismissed. No costs. Consequently, C. A. No. 1145 of 2001 is closed.