

(2014) 12 CAL CK 0074
In the Calcutta High Court

Case No : APO Nos. 452 and 302 of 2014 and CP No. 552 of 2013

Bibby Financial Service India Private Limited

APPELLANT

Vs

SSS Loha Marketing Private Limited
 SSS Loha
Marketing Private Limited Vs Bibby Financial Service India
Private Limited

RESPONDENT

Date of Decision : 02-12-2014

Acts Referred:

Companies Act, 1956 — Section 434

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2014) 12 CAL CK 0074

Hon'ble Judges : Ashis Kumar Chakraborty, J;A.K. Banerjee, J

Bench : Division Bench

Advocate : M.S. Vinayak and Ahana Sikder, Advocates, Samit Talukder, Senior Advocate, Suman Dutt and Hasnuhana Chakraborty, Advocate for the Appellant

Judgement

Ashis Kumar Chakraborty, J.—The subject matter of challenge in these appeals is an order dated May 13, 2014 passed by a learned Single Judge admitting an application for winding up of the company one namely, SSS Loha Marketing Private Limited for Rs. 3,00,06,655/-. The appeal being APO 452 of 2014 is at the instance of the company challenging the order admitting the winding up application. The other appeal being APO 302 of 2014 is on behalf of the petitioning creditor who claims that the learned Single Judge ought to have admitted the winding up application for Rs. 4,00,06,655.52/- as claimed in the application.

2. We shall first deal with the appeal of the APO 452 of 2014.

3. According to the appellant company, it has no outstanding dues to the respondent and the learned Single Judge erred in admitting the winding up petition. For the purpose of the disposal of this appeal and as also the cross-objection we first set out the undisputed facts of this case.

4. The respondent in the appeal (APO 452) carries on business, inter alia, of

factoring of receivables. The appellant company obtained supply of certain materials from Ramsarup Industries Ltd. (hereinafter referred to "as the borrower company"); The Borrower Company raised particular invoices on the appellant company for Rs. 4,00,06,655.52/- on account of price of such materials. The borrower company was in immediate need of funds, they approached the respondent for availing of the factoring service, that is, factoring against receivables. An agreement dated August 21, 2009 for the factoring of receivables was entered into between the respondent and the said borrower company (hereinafter referred to as the "said factoring agreement") providing, inter alia, that the respondent would make immediate payment, on account of the said invoices raised on the appellant, to the borrower company, on behalf of the appellant company being the buyer of the said materials. The factoring agreement came into effect on September 21, 2009. By a letter dated November 19, 2009 the borrower company informed the appellant, the purchaser of the execution of the said factoring agreement and that it has received a sum of Rs. 4,00,06,655/- from the respondent on account of specific outstanding twenty nine invoices raised on the appellant. The said letter irrevocably authorized the appellant company to make all payments, in respect of the said twenty nine invoices and future invoices directly to the respondent. By a letter dated November 19, 2009 addressed to the respondent, (at page 103 of Vol 1 of PB) the appellant confirmed the supply of materials from the borrower company and acknowledged and agreed to make payment, on account of the said twenty nine invoices directly to the respondent. Along with the said letter the appellant forwarded to the respondent a post dated cheque of Rs. 4,00,06,655.52/- towards payment of the said twenty nine invoices raised by the borrower company. Subsequently, the respondent also factored other invoices raised by the borrower company on account of supply made to the appellant and a further sum of Rs 1,00,00,536/- became payable by the appellant to the respondent.

5. By a letter dated February 19, 2010 the appellant admitted to have issued two cheques of Rs. Rs. 4,00,06,655.52/- and Rs. 1,00,00,536.00/- dated February 17, 2010 and March 13, 2010 to on account of their liability in respect of the said factored invoices of the borrower company. However, by the said letter the appellant requested the respondent to present the said cheque dated February 19, 2010 of Rs. 4,00,06,655.52/- for payment on March 13, 2010 to permit them to tide over temporary cash mismatch. These two cheques were of Allahabad Bank. By a letter dated February 22, 2010, the appellant informed the respondent that they have closed their account with the Allahabad Bank and as such forwarded two cheques for Rs. 4,00,06,655.52/- and Rs. 1,00,00,536.00/- both dated February 23, 2010 drawn on Bank of Baroda and requested the respondent to deposit the said cheques on March 13, 2010 due to the current mismatch in cash flow. By two separate forwarding letter the appellant sent to the respondent two drafts both dated March 5, 2010 and March 31, 2010 for a sum of Rs. 75 lac and 25 lac and the same were encashed by the respondent. In May, 2010, the respondent presented the said cheque for Rs. 4,00,06,655.52/-

for enactment but the said cheque was dishonoured by Allahabad Bank on account of insufficient funds.

6. In view of the dishonour of the said cheque of Rs. 4,00,06,655.52/- and subsequent failure of the appellant to pay the said sum of Rs. 4,00,06,655.52/-, the respondent filed a complaint under Section 138 of the Negotiable Instruments Act, against the appellant and its directors before the learned Judicial Magistrate, First Class, Gurgaon, Haryana (hereinafter referred to as "the learned Judicial Magistrate"). After receipt of the summons, the Managing Director of the appellant company appeared before the learned Judicial Magistrate, on September 27, 2010 and made over three demand drafts all dated September 25, 2010, issued by a bank of Kolkata for a sum of Rs. 30 lacs in favour of the respondent. Before the learned Judicial Magistrate the Managing Director of the appellant further stated on oath that he is willing to effect compromise the matter with the respondent after admitting the liability on behalf of the appellant company and he is ready to pay the cheque amount within three months. However, the appellant made no further payment to the respondent.

7. By a notice dated May 28, 2010, the respondent called upon the appellant to pay the said sum of Rs. 4,00,06,655.52/- together with interest thereon. The appellant through its advocate replied to the said notice of the respondent and denied any liability to pay to the respondent. The respondent filed an application being C.P. No. 591 of 2011 before this Court, praying for winding up of the appellant company. By an order dated January 30, 2013, the said winding up application was rejected by a learned Single Judge, on the ground of absence of proper service of the statutory notice, but with an observation that the said order will not preclude the respondent herein instituting fresh proceedings against the appellant. The respondent issued a fresh notice dated March 5, 2013, under Section 434 of the Companies Act, 1956, calling upon the respondent/appellant to pay the said sum of Rs. 4,00,06,655.52/-together with interest thereon at the rate of 24 % p.a. till the date of payment. By a letter dated March 25, 2013 the appellant through its advocate replied to the said notice dated March 5, 2013 denying their liability to pay any money to the respondent and alleged that the said cheques of Rs. 4,00,06,655.52/- and Rs. 1,00,00,536/- were not issued by them in respect of any acknowledgement of debt to the respondent. In the said letter the appellant alleged that said post dated cheques were issued at the instance of the borrower company who sought financial favour from the respondent.

8. On July, 2013 the respondent filed fresh winding up application against the appellant before this Court. Before the learned Single Judge, the appellant, filed its affidavit-in-opposition and the respondent/petitioning creditor filed its affidavit in reply. Thereafter, on April 7, 2014, the appellant filed a supplementary affidavit. Before the learned Single Judge, the appellant put up its first defence that it was not a party to the said factoring agreement, between the respondent/petitioning creditor and the said borrower company and it had no liability to

make any payment to the petitioning creditor. The second defence of the appellant was that it had already made all payments in respect of the invoices in question to the said borrower company and in terms of Clause 4.2 the said factoring agreement, the borrower company was holding all such sums in trust for the respondent. According to the appellant, it was the borrower company who is liable to pay the said sum of Rs. 4,00,06,655.52/- to the respondent. In support of claim that they have already made payment in respect of the said twenty nine invoices in to the borrower company the appellant relied on a statement issued by its bank. By the impugned order, the learned Single Judge did not accept any of the contentions of the appellant company and admitted the winding up application for a sum of Rs. 3,00,06,655/-. The learned Single Judge, however, granted opportunity to the appellant to make payment of the said sum of Rs. 3,00,06,655/- in three equal monthly installments. In the mean time the borrower company has become a sick industrial undertaking within the meaning of the provisions contained in Board of Industrial and Financial Reconstruction (Special Provisions) Act, 1985 and its reference to the Board of Industries and Financial Reconstruction has been registered with BIFR.

9. Challenging the order of the learned Single Judge admitting the winding up application, Mr. Samit Talukdar, learned senior counsel appearing for the appellant company argued that the winding up application filed by the respondent involved disputed questions of fact and the learned Single Judge committed an error in admitting the application. Mr. Talukdar first contended that the appellant had no liability to make any payment to the respondent as it was not a party to the said factoring agreement. He urged that the appellant had never accepted assignment of any liability to make any payment to the respondent on account of the said twenty nine invoices raised by the said borrower company upon the appellant. Mr. Talukdar relied on a statement of the bank account of the appellant, disclosed before the learned Single Judge by way of a supplementary affidavit and contended that the appellant had already paid a sum of Rs. 3.85 crores to the borrower company which sum, according to him, the said borrower company was liable to pay to the respondent. He relied on clause 4.2 of the said factoring agreement and submitted that as per the said clause the Borrower Company is holding the said sum of Rs. 3.85 crores in trust for the respondent and the respondent is to recover its dues from the borrower company. He further argued that through the said two demand drafts both dated March 5, 2013 the respondent received Rs. 1 crore. Thus, there remained a balance sum of Rs. 15 lac which was paid by the appellant, before the learned Judicial Magistrate, on September 27, 2013. In support of the contention that the said borrower company received the said sum of Rs. 3.85 crores from the appellant on account of the said twenty nine invoices in question and the same was acknowledged by the borrower company, Mr. Talukdar further relied on two communications both dated June 2, 2010 The first letter dated June 2, 2010 is from the appellant to the borrower company, alleging that the appellant had issued the said cheque dated February 23, 2010 for the said sum of Rs.

4,00,06,655.52/- in favour of the respondent on instruction of the borrower company on the understanding that as soon as the appellant would make payment to the borrower, would pay the same amount to the respondent and instruct the respondent not to deposit the said cheque. In the said letter it was further alleged that the appellant had already made payment to the said borrower company for the materials sold or delivered by the borrower company.

10. The second letter is from the said borrower company to the appellant, is also dated June 2, 2010. By this letter the said borrower company alleged that they had already instructed the respondent not to deposit the said cheque dated February 23, 2010 for the said sum of Rs. 4,00,06,655.52/- and the amount claimed by the respondent in the notice dated May 28, 2010 is not the liability of the appellant. According to Mr. Talukdar as indicated in the said letter dated June 2, 2010, a copy of the said letter was forwarded to the respondent. It was strenuously argued, that the said statement of bank account of the appellant, as was disclosed by the supplementary affidavit before the learned Single Judge and the said letters both dated June 2, 2010 ex facie substantiate the defence of the appellant that no money remained outstanding from the appellant to the respondent and as such the learned Single Judge ought to have rejected the winding up application. With regard to the admission made by the Managing Director of the appellant before the learned Judicial Magistrate and the payment of Rs. 30 lacs by three demand drafts, Mr. Talukdar submitted that those were all under coercion and/or threat.

11. However, Mr. M.S. Vinayak, learned Advocate appearing on behalf of the respondent submitted that in view of the said notice of assignment of debt dated November 19, 2009 issued by the said borrower company to the appellant and the letter dated November 19, 2009 issued by the appellant acknowledging and agreeing to make payment directly to the respondent on account of the said borrower company and issuance of the said post dated cheques of Rs. 4,00,06,655.52/- and Rs. 1 crore, the defence sought to be raised by the appellant, that it had no liability to make any payment to the respondent on account of the said invoices raised by the borrower company, is nothing but an after thoughts and the same lacks bona fide. So far as the contention of the appellant that they had already paid a sum of Rs. 3.85 crores to the said borrower company on account of the said invoices in question and that the same would be evident from the statement of the bank account, Mr. Vinayak submitted that the respondent/creditor was never informed of such alleged payment nor there is any proof that such payments from the respondent to the said borrower company were in respect of the said twenty nine invoices. He further submitted that the respondent had never received any of the said communications dated June 2, 2013 exchanged between the respondent and the borrower company, as claimed by the appellant. On behalf of the respondent, it was strenuously argued that the falsity of the defence raised by the appellant is evident from the admission of the Managing Director of the appellant company made before the learned Judicial Magistrate and the making over the said three drafts all dated

September 25, 2010 issued by the bank of Kolkata, for the said sum of Rs. 30 lacs. Mr. Vinayak further urged that the recording of the admission of the liability made by the Managing Director of the respondent in the said order dated September 27, 2010 by the learned Judicial Magistrate has not been challenged by the appellant or its said Managing Director before any superior court of law. He submitted that filed an application under Section 482 of the Code of Civil Procedure before the High Court at Chandigarh for quashing of the said complaint case pending before the learned Judicial Magistrate, though unsuccessfully. Thus, according to the respondent, the allegation of coercion and/or threat on the Managing Director on the appellant is absolutely unfounded.

12. We have considered the submissions made on behalf of both the parties and perused the documents disclosed by them. In order to decide this appeal, we have to ascertain whether the defence disclosed by the appellant against the said claim of the respondent for Rs. Rs. 4,00,06,655.52/- is bona fide or not. The learned Single Judge held that the acknowledgment of liability is clear on replacement of the cheques drawn on Allahabad Bank by the cheques drawn on Bank of Baroda and the defence put up by the appellant, was not accepted.

13. So far as the first defence of the appellant, that they were not party to the said factoring agreement between the respondent and the borrower company and they were not at all liable to make any payment to the respondent we find no merit. From the facts stated above, it is evident, the appellant had received the notice of assignment dated November 19, 2009 issued by the borrower company and by their own letter dated November 19, 2009 addressed to the respondent, the appellant acknowledged its obligation to make payment to the respondent in terms of the said notice of assignment dated November 19, 2009 of the borrower company. They also made over the post dated cheque of Rs. 4,00,06,655.52/- to the respondent towards payment against on account of twenty nine invoices specified in Annexure 1 to the said letter. It is further evident that apart from the said sum of Rs. 4,00,06,655.52/- on account of the said twenty nine invoices raised by the borrower company, the appellant issued another post dated cheques of Rs. 1 crore in favour of the respondent on account of the some fresh invoices raised on them by the said borrower company which were also factored by the respondent. By the said letter dated February 19, 2009 the appellant company admitted to have issued the said two post dated cheques for Rs. 4,00,06,655.52/- and Rs. 1,00,000,536/- on account of the respondent having factored invoices of the borrower company raised on them and further requested the respondent to present the said cheque of Rs. 4,00,06,655.52/- on March 13, 2010. All these evidently show, the appellant company accepted their obligation to make payment to the respondent on account the said invoices raised on them by the borrower company.

14. The second defence of the appellant is sought to be based on Clause 4.2 of the said factoring agreement where the said borrower and the respondent are described as "The Borrower" and "Bibby" respectively. The said clause 4.2 is set

out herein below:

"4.2. The Borrower hereby agrees that the Borrower shall serve a notice of assignment of the Receivables and Associated Rights in favour of Bibby and shall provide a duly acknowledged copy thereof to Bibby along with the request for pre payment of Receivable. The Borrower further agrees that any sum realized by the Borrower directly from a Debtor shall be the property of Bibby and the Borrower shall forthwith deposit the same with Bibby. Till deposit of any such sum, the Borrower shall hold any such sum in trust for Bibby."

15. Mr. Talukdar, learned senior counsel relied on the latter part of the aforesaid Clause 4.2 of the factoring agreement and contended that as reflected in the said bank statement, the appellant had already paid Rs. 3.85 crores to the said borrower company and the respondent is entitled to recover the said money from the borrower company.

16. The learned Single Judge did not accept such contention of the appellant.. We have already found that the appellant company issued the said cheque of Rs. 4,00,06,655.52/- in favour of the respondent, to discharge their liability to the respondent on account of the purchase of the said materials covered by the said twenty nine invoices, issued on them by the borrower company. The payments of the various sums amounting to Rs. 3.85 crores by the appellant company to the Borrower Company, as reflected in the statement of bank account of the appellant, are all in the month of March and April 2010. Upon dishonour of the said cheque of Rs. 4,00,06,655.52/- by the Bank of Baroda, on the ground of insufficient funds, the respondent issued a notice dated May 28, 2010, under Section 138 of the Negotiable Instrument Act, 1882 to the appellant which was replied by the appellant by its letter dated June 3, 2010. It is interesting to note that in the said letter dated June 3, 2010, the appellant only alleged that they have made payment to the borrower company who is liable to pay the dues of the respondent, but there is no mention of the particulars of such payment. Thereafter, on March 5, 2013 the respondent issued the notice under Section 434 of the Companies Act, once again calling upon the respondent to pay the said sum of Rs. 4,00,06,655.52/-. In the said notice the respondent also stated that with regard to the factoring transaction for Rs. 1,00,000,536/- covered by the said cheque dated February 23, 2010, by two demand drafts for Rs. 75 lacs and 25 lacs the appellant company has already paid its dues. By a letter dated March 25, 2013, appearing the appellant company through its advocate replied to the said notice dated March 5, 2013 and alleged that they had paid all monies to the borrower company and as such the respondent should recover the said sum from the borrower company. However, once again in the said letter dated March 25, 2013 there was no mention of the particulars of the payment alleged to have been made by the appellant company to the borrower. In the mean time, when the Managing Director of the appellant appeared before the learned Judicial Magistrate, he made over three bank drafts for a sum of Rs. 30 lacs issued by the banks from Kolkata, in favour of the respondent and made an express

admission of the liability of the appellant to the respondent. This admission of the Managing Director before the said Judicial Magistrate remained unassailed. In the instant case, there is conspicuous absence of any contemporaneous correspondence from the appellant to the respondent about payment of the said Rs. 3.85 crores to the borrower company on account of the said twenty nine invoices. Further, there is nothing in writing from the appellant to the respondent either claiming return of the said cheque dated February 23, 2010 for Rs. 4,00,06,655.52/- or calling upon the respondent not to deposit the said cheque as the appellant has already paid the said sum of Rs. 4,00,06,655.52/- to the borrower. The said cheque of Rs. 4,00,06,655.52/- was dishonoured, not on the ground of instruction to the bank for stop payment rather the said cheque was dishonoured on the ground of insufficient fund. With all these facts, if the appellant had already paid the said sum of Rs. 3.85 crores, on account of the respondent, to the borrower it defeats all reasoning why the appellant would make further the payment of 30 lacks to the respondent on September 27, 2010 or its Managing Director would make such admission of liability to the respondent before the learned Judicial Magistrate. Thus, we are unable to accept the contention made on behalf of the appellant company that the payment of the said sum of Rs. 3.85 crores reflected in the bank statement of the appellant were in respect of their dues to the respondent or that they had no liability to honour the said cheque of Rs. 4,00,06,655.52/-.

17. In the instant case, it an admitted position that the appellant had issued the first cheque of Rs. 4,00,06,655.52/- in favour of the respondent and on February 19, 2010 substituted the said cheque by issuing a fresh cheque of Rs. 4,00,06,655.52/- and the said cheque remained unpaid. Thus, the onus was on the appellant company to prove that it had no liability to pay the said sum of Rs. 4,00,06,655.52/- to the respondent which the appellant company has failed to discharge. In the instant case, we find the defence put up by the appellant lacks bona fide and good faith. Thus, we find no merit in the appeal being APO 302 of 2014 and the same stands rejected. Interim orders, if any also stands vacated.

18. Now, Mr. Vinayak in support of the appeal, being in APO 302 urged that the winding up application ought to have been admitted for Rs. 4,00,06,655.52/- and not for Rs. 3,00,06,655/-.

19. The learned Single Judge admitted the application for Rs. 3,00,06,655/-, as from the documents disclosed it appears that the appellant in this appeal accepted the said two demand drafts for Rs. 75 lac and Rs. 25 Lac against six of the said twenty nine invoices. According to Mr. Vinayak the respondent in this appeal had issued the said two post dated cheques of Rs. 4,00,06,655.52/- and Rs. 1,00,000,536 in acknowledgement of their dues to the appellant in this appeal for factoring said twenty nine and other invoices. However, when the respondent forwarded the said demand drafts of Rs. 75 lacs and Rs. 25 lacs respectively, there was no mention about any specific invoice. Thus, he contended, it was within the right of the appellant in this case to appropriate the

said sum of Rs. 1 crore said by the said in respect of some of the said twenty nine bills. Thus, once the respondent had issued the said two post dated cheques for a total sum of Rs. 5,00,07,191/-, even after giving credit to the payment of the said sum of Rs. 1 crore, a sum of Rs. 4,00,06,655.52/-still remains due and payable by the respondent to the appellant. We find merit in such contention made on behalf of the appellant in this appeal.

20. In result, we only modify the order dated May 13, 2014 passed by the learned Single Judge to the effect that application for winding up of the company, namely, SSS Loha Marketing Private Limited is admitted for a sum of Rs. 4,00,06,655.52/-. The appellant in APO 302 of 2014 will be entitled to advertise the winding up application once in the Bengali daily "Ananda Bazar Patrika" and once, in the English daily "The Times of India" (Kolkata) within two weeks from date. The winding up application is made returnable eight weeks hence. The appeals are disposed of accordingly without any order as to costs.

Ashim Kumar Banerjee, J.

I agree.