
(2013) 05 DEL CK 0462

In the Delhi High Court

Case No : Co. Petition 328 of 2011 and Co. Application 1703 of 2012

Bibby Financial Services India Pvt. Ltd.

APPELLANT

Vs

Ecotech Apparels Pvt. Ltd.

RESPONDENT

Date of Decision : 08-05-2013

Acts Referred:

Companies Act, 1956 — Section 433, 433(e), 434, 434(1)(a), 434(1)(c)

Citation : (2013) 117 CLA 657 : (2013) 181 CompCas 211 : (2013) 200 DLT 489

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Anjali Sharma and Mr. Praveen Kumar, for the Appellant; Ashish Dhingra and Mr. Sugam Puri, for the Respondent

Judgement

S. Muralidhar, J.—Bibby Financial Services India Pvt. Ltd. ("Bibby") has filed this petition u/s 439 read with Sections 433(e) and 434 of the Companies Act, 1956 ("Act") seeking the winding up of the Respondent, Ecotech Apparels Pvt. Ltd. ("EAPL") on the ground of its inability to pay its debts. The background facts are that in the year 2008, EAPL approached Bibby to avail of factoring facility to the tune of Rs. 2,50,00,000. In para 9 of the petition, a factoring transaction is explained as under:

Essentially, in a factoring transaction what occurs is that in consideration of finance provided by the Factor (which in this case is the petitioner), the borrower (which in this case is the respondent) assigns the receivables under its commercial transaction to the Factor, and also specifically makes itself liable for rendering all outstanding amounts to the Factor, in the event of the purchaser of goods defaulting in making payment of the Borrower's receivables to the Factor. Effectively, what the respondent would do in this transaction is to sell goods to its purchaser; and in consideration of its executing the relevant factoring documents, the respondent, as borrower, would then be paid a part of the value of the said goods by the Petitioner, i.e., the Factor. Thereafter, both the purchaser of goods (referred to in the transaction as "approved debtor") and the seller (i.e.

the "Borrower" in factoring transaction") would be liable to make payments to the Factor, until receipt of all dues under the transaction by the Factor.

2. An agreement was executed between the parties on 28th January 2008 for factoring of receivables (hereafter "factoring agreement"). Under the said agreement, EAPL was described as "the borrower". The various terms used in the factoring agreement were defined as under:

1.8 Debtor means a person who is or may become indebted to the Borrower in respect of any Receivable under a Supply Contract and who is pre approved by Bibby.

1.17 Purchase Price means the amount Bibby agrees to prepay to the Borrower for a Receivable and its Associated Rights;

1.18 Receivables means the aggregate amount (or any part thereof, wherever the context so requires) of any indebtedness incurred by the debtors of the Borrower under Supply Contracts with the Borrower and notified by the Borrower to Bibby under Clause 9.1 (iv);

1.19 Recourse means the right of Bibby to require the Borrower to repurchase a notified Receivable at a price equal to the amount remaining unpaid by the Debtor along with any other charges and costs in respect thereof.

3. Under Clause 4.1 in consideration of Bibby paying EAPL the Maximum Prepayment Percentage of the receivables of EAPL, EAPL irrevocably and unconditionally agreed to sell, transfer and assign to Bibby the receivables due and payable from the Debtors. Under Clause 4.2 of the factoring agreement, it was provided that EAPL would 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 with a request for prepayment of the receivables. EAPL further agreed that any sum realized by it directly from a debtor shall be the property of Bibby and EAPL shall forthwith deposit the same with Bibby. Till such deposit, EAPL was to hold such sum in trust.

4. Under Clause 9.1, EAPL warranted, agreed and undertook as under:

(xviii) that the Borrower shall at all times ensure that sufficient funds are made available in his bank account, on which the post dated/security cheques issued by the Borrower to Bibby have been drawn. Bibby shall not be required to give any notice to the Borrower before presenting the post dated/security cheques. In the event Bibby presents the post dated/security cheques furnished to it and the same are dishonoured for any reason whatsoever Bibby shall inter alia, have a right to proceed against the Borrower under the Negotiable Instruments Act, 1881;

(xix) that the Borrower agrees that the Borrower shall not issue any stop payment instructions to its bankers or do any such acts to prevent Bibby from presenting the post dated/security cheques.

5. Clause 11 of the factoring agreement dealt with "Recourse and set-off" and read as under:

11. Recourse and Set-off

11.1 The Borrower hereby agrees that without prejudice to the various rights that Bibby has hereby reserved or otherwise available to Bibby under law, Bibby shall have the right to Recourse as under:

a. in respect of each Receivable which Bibby has not received by the due date whether by reason of legal constraints or acts or orders of government or for any other reason whatsoever.

b. in respect of each Receivable which the Debtor or his legal representative disputes.

c. in respect of all outstanding Receivables upon the occurrence of a Termination Event;

d. in respect of the Receivables wherein the Debtor is insolvent;

Bibby may notify the Borrower on which Receivables Bibby intends to exercise its Recourse. Without prejudice to the foregoing, the Borrower agrees that Bibby's Recourse to the Borrower shall be automatic after the lapse of 30 day of the due date of the Receivable.

11.2 Upon Bibby exercising its Recourse in respect of any Receivable the Borrower shall be liable to pay Bibby the amount prepaid by Bibby plus any associated costs and charges in respect of the Receivable pursuant to clause 3 herein contained. The Borrower shall pay all such amounts on receipt of demand for payment from Bibby. Without prejudice to the aforesaid, Bibby shall have a right to present the post dated/security cheques(s) furnished by the Borrower to Bibby in respect of the Receivable on which the Recourse is being exercised.

11.3 After exercising Recourse, Bibby will credit the Borrower or set off with all sums subsequently recovered by Bibby in respect of the Receivables or Associated Rights.

11.4 The Borrower agrees that the Receivable and Associated Rights in respect of which Recourse is being exercised shall, unless or otherwise determined by Bibby, remain vested in Bibby until the repurchase price been fully discharged, whether by payment to Bibby or by set off against an amount payable by Bibby to the Borrower under this Agreement.

11.5 Bibby shall have a right to set off against any sum payable to the Borrower the amounts due and payable by the Borrower to Bibby, whether under this Agreement or otherwise, whether existing, future or contingent and whether by way of debt, damages or restitution.

6. Clause 3 of the Schedule to the factoring agreement gave details of the nature of sanctioned domestic factoring with recourse. The Schedule also specified the

maximum limit apart from discount charges, service charges, domestic and other charges. Clause 11 of the Schedule described "Approved Debtors" as "The Debtors of the Borrower approved by the Factor and communicated to the Borrower, from time to time by way of a Debtor letter." It stated that "The Factor will have the right to cancel limits approved or approve new limits/Debtors and to impose/amend terms and conditions applicable to each Debtor. Communications sent by the Factor in this regard from time to time shall be binding upon the Borrower."

7. Under Clause 13 of the Schedule under the caption "Notice for Recourse to the Borrower", it was stated "Recourse to the Client will be automatic on the expiry of 30 days from the due date of payment by the Debtor, or earlier, as advised by the Factor."

8. Simultaneous with the execution of the factoring agreement and the supplementary agreement dated 28th January 2008, the following documents were also executed:

(i) Notice of Assignment of Debts

(ii) Promissory Note

(iii) Agreement for Hypothecation of Receivables.

(iv) Notice of Assignment dated 25th January, 2008, vide which the respondent company required the approved debtor, Koutons Retail India Ltd., to make all payments to the petitioner, duly accepted by Koutons.

(v) Guarantees and undertakings executed by the directors of the respondent, affirming that all payments would be rendered, etc.

9. In terms of Clause 4.1 of the factoring agreement Koutons Retail India Ltd. ("KRIL") was the Approved Debtor. The arrangement was that for the supplies made by EAPL to KRIL, the payment to be made by KRIL against the invoices raised by EAPL would be made directly to Bibby. It was made clear in the notice of assignment of debt dated 25th September 2008 addressed by EAPL to KRIL, with a copy to Bibby, that the receipt of payments by Bibby would constitute a valid discharge of the amounts due and payable by KRIL to EAPL under the invoices. Simultaneously, KRIL issued a letter to Bibby accepting the terms of the letter dated 25th September 2008 issued by EAPL to KRIL informing it of the factoring agreement.

10. On 3rd March 2010, a Debtor Letter was issued by Bibby to EAPL, giving the up-to-date details as regards KRIL. This was accepted and co-accepted by both EAPL and KRIL by countersigning the letter. A Letter of Guarantee was executed by Mr. Gagandeep Singh Sahni, the Director of EAPL and his father, Mr. Harinder Singh Sahni. Thirty one post-dated cheques (PDCs) drawn on Indian Overseas Bank, totalling Rs. 7.5 crores towards security were also issued.

11. Bibby's case is that defaults were committed by both KRIL and EAPL in

making the payments. The PDCs dated 2nd November 2010 issued by EAPL in favour of Bibby when presented for payment were dishonoured with the remarks "funds insufficient". The photocopies of the said PDCs and the confirmation from ICICI Bank as regards their dishonour have been enclosed with the petition. As on 2nd July 2011, EAPL owed Bibby a sum of Rs. 8,98,80,162. A statutory notice of demand was issued on 30th June 2011 by Bibby to EAPL calling upon it to make the aforementioned payment along with the contractual charges within three weeks. With no reply forthcoming, the present petition was filed on 3rd August 2011.

12. Pursuant to the notice issued in the petition, EAPL appeared before the Court on 24th November 2011 and was granted four weeks" time to file a reply. When none appeared on behalf of EAPL before the Registrar on 16th April 2012, fresh notice was issued by the Court on 25th April 2012 to Bibby to appear before the Court. On 5th September 2012, the following order was passed:

None has appeared for the respondent. Mr. Gangandeep Singh Sahni, the Director of the respondent company has been served.

Petitioner is seeking winding up of the respondent company. A factoring agreement was entered into between the parties; cheques were issued by the respondent; which stood dishonoured. The respondent is stated to be indebted to the petitioner for a sum of Rs. 8,98,80,162/- along with interest and other charges. Details of the cheques find mention at Annexure F. The liability of the respondent qua the petitioner stands admitted. Petition is accordingly admitted.

Let citation of this petition now be published in the newspapers Times of India (Delhi-English edition) and Jansatta (Delhi-Hindi edition); publication be also effected in the Official Gazette. Petitioner shall take necessary steps.

13. Bibby filed Co. Appl. No. 1703 of 2012 under Sections 443(c) and 450 of the Act for appointment of a provisional liquidator ("PL"). Notice was issued on the said application on 11th September 2012. On 27th November 2012, EAPL entered appearance through counsel who submitted that he was not aware of the earlier proceedings. He offered on behalf of EAPL to settle the disputes with Bibby. The Managing Director ("MD") of EAPL was directed to remain present on the next date and also to pay the costs of Rs. 10,000 for filing a reply within three weeks.

14. On the next date, i.e., 12th February 2013, again no reply was filed. Again, no reply was filed. The following order was passed on that date:

Mr. Hemant Chaudhary, Advocate appears for the Respondent. Mr. Gagandeep Singh, the Managing Director ("MD") of the Respondent is also present.

As a last opportunity, reply to the petition be filed on or before 1st March 2013, subject to costs of Rs. 2,500 being paid by the Respondent to the Petitioner before that date and proof of payment of costs be filed along with the reply. Rejoinder, if any, be filed before the next date.

In the reply, the MD of the Respondent will set out the details of all the assets, movable and immovable and enclose with the affidavit the balance sheets, profit & loss account and the statement of bank accounts for the last three years.

Till the next date of hearing, the Respondent is restrained from transferring, alienating, creating any third party rights or charge in respect of any of the immovable assets of the Respondent.

If any of the above directions are not complied with, Mr. Gagandeep Singh, the MD of the Respondent will remain present in Court.

List on 8th April 2013.

15. On 10th April 2013, Mr. Vijay Aggarwal, learned counsel for EAPL tendered EAPL's reply in Court. The following order was passed on 10th April 2013:

With the consent of parties, the matter is taken up.

Mr. Gagandeep Singh, Managing Director of the Respondent is present in Court.

Mr. Vijay Aggarwal, learned counsel for Respondent tendered a reply in Court and an advance copy has been given to the Petitioner. Mr. Aggarwal states that although the balance sheets and statement of accounts have not been enclosed with the reply it will be filed within one week with advance copy to the learned counsel for Petitioner. Response thereto, if any, be filed before the next date.

Without prejudice to what has been stated in the reply Mr. Aggarwal states that the Respondent will make a proposal to pay the admitted amount in installments. The proposal be given to the Petitioner at least one week prior to the next date.

Mr. Gagandeep Singh, Managing Director of the Respondent will remain present in Court on the next date.

List on 7th May 2013.

16. When the matter was listed next on 7th May 2013, learned counsel for EAPL handed over in Court the further reply of EAPL admitting to the liability of KRIL and stating that EAPL could only start paying Bibby "the impugned sum of Rs. 7.15 crore from 30th August 2013 onwards" in thirty six installments. Para 2 of the said reply set out the time schedule of the thirty six installments, beginning 30th August 2013 and ending on 30th July 2016.

17. Ms. Anjali Sharma, learned counsel for Bibby immediately informed the Court that the offer made by EAPL for payment in 36 installments was not acceptable to Bibby. She urged that the petition should be heard on merits. However, Mr. Sugam Puri, learned counsel for EAPL sought one more indulgence as Mr. Vijay Aggarwal, the arguing counsel, was stated to be busy elsewhere. As a last opportunity, the matter was listed for 8th May 2013.

18. Today, the submissions of Ms. Anjali Sharma, learned counsel for Bibby and of Mr. Ashish Dhingra, learned counsel for EAPL have been heard.

19. In the reply filed by EAPL, a preliminary objection has been taken that the demand notice in terms of Section 434 of the Act was not served at the registered office of EAPL. It is stated that the documents placed on record show that the legal notice was served at F-9, Udyog Nagar, Peeragarhi Chowk, New Rohtak Road, New Delhi-110 041, whereas EAPL shifted from the said office in March 2011. It is stated that an e-Form 18 was filed with the Registrar of Companies ("ROC") to that effect in April 2011. It is stated that with effect from 26th April 2011, the registered office of EAPL has been shifted to Plot No. 11, Samalka, Kapashera-Najafgarh road crossing, New Delhi 110 037. Reliance is placed on the decisions in Winter Misra Diamond Tools Ltd. Vs. Payal Granites (P.) Ltd. , N.L. Mehta Cinema Enterprises (P.) Ltd. Vs. Pravinchandra P. Mehta,), Donghee Vision Industrial Company Ltd. Vs. Tube Investments of India Ltd. and Another, P.S.V.P. Vittal Rao Vs. Progressive Constructions Private Limited), Vysya Bank Ltd. Vs. Randhir Steel and Alloys (P.) Ltd., , Kold-Hold Industries P. Ltd. Vs. Arabian Exports Ltd., , Andhra Cements Limited Vs. Bhatia International Ltd. and Others, , J.M. International Vs. Magan Roller Flour Mills (P.) Ltd., It is urged that the mandatory requirement of Section 434 of the Act not having been met, the present petition cannot be entertained by the Court.

20. In order to deal with the above submission reference may be made first to Section 433(e) which states that one of the circumstances under which a company should be wound up is "if the company is unable to pay its debts." Section 434 of the Act specifies when that deeming fiction results. It reads as under:

434. Company when deemed unable to pay its debts.--(1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding [one lakh rupees] then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a decree or order of any Court or [Tribunal] in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the [Tribunal] that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the [Tribunal] shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm.

21. An analysis of Section 433(e) read with Section 434 of the Act shows that the conditions in Section 434 (1) (a) and 434(1) (c) are disjunctive. In other words, even if the condition u/s 434 (1) (a) regarding service of notice on the company at its registered office by registered post is unable to be fulfilled, the petitioning creditor can show the Court that a company is nevertheless unable to pay its debts. In *Kalra Iron Stores Vs. Faridabad Fabricators P. Ltd.* (No. 2), , this Court held that "even without invoking the deemed inability of the company to pay its debts, a creditor can seek winding up of a company u/s 433(e) read with Section 434(1)(c)." However, in order to succeed on that basis, there has to be a pleading with reference to Section 433(e) or in respect of Section 434(1)(c) of the Act. In the absence of such pleading, the Court will decline to entertain the petition where the requirement of Section 434(1)(a) has not been met [see *State Black Sea Shipping Company and Mr. Joydeb Kundu Vs. Viraj Overseas Pvt. Ltd.*,

22. In the present case, even if one proceeds on the basis that the statutory notice u/s 433 read with Section 434(1)(a) was not delivered at the registered office of EAPL, the averments in the petition satisfy the requirement of Section 433(e) read with Section 434(1)(c) of the Act. In paras 15 and 16, it is averred as under:

15. The petitioner therefore issued a statutory notice of demand to the respondent, on the 30th of June 2011. The petitioner demanded vide the same that the sum of Rs. 8,98,80,162 (Rupees Eight Crores Ninety Eight Lakhs Eighty Thousand One Hundred and Sixty Two only), along with other contractual charges payable under the agreement, be paid to it forthwith, and in any case not later three weeks after receipt of the notice of demand. The notice issued by the petitioner has been duly received by the respondent, but let alone accede to the petitioner's demand, and pay its dues, or even ask for further time, the respondent has failed completely to reply to the same. True copies of the notice that was issued, and proof of dispatch and receipt, are annexed herewith and marked as Annexure I (Colly).

16. The petitioner affirms that a period of more than three weeks has elapsed since the service of its notice of demand upon the respondent, for the amounts due and owing to it. The respondent's continued silence, and obdurate failure to clear the outstanding, despite every effort, exhortation and the like, raises an inference of the inability of the respondent Company to pay its debts. As such, it would be reasonable to infer that the respondent Company, Ecotech Apparels Pvt. Ltd. is no longer viable, and has become commercially insolvent. The respondent Company, therefore, deserves to be wound up.

23. The above averments have to be viewed in the context of two other facts, which are not denied by EAPL. One is that the PDCs issued by EAPL in favour of Bibby when presented for payment stood dishonoured. The details of the PDCs and the reasons for dishonour of those cheques as informed to Bibby by the bank have been enclosed with the petition. The second fact is that even in its own balance sheet for the years ending 31st March 2010, 31st March 2011 and 31st

March 2012, EAPL has admitted that it owes Bibby substantial sums under the head "secured loans" with the words "secured by personal guarantee of Director" in parentheses. Copies of the balance sheets of EAPL have been enclosed with its reply tendered in Court on 7th May 2013. The amounts shown in the balance sheet of EAPL, as owing to BIBBY, read as under:

As on 31st March 2009: Rs. 33,053,052

As on 31st March 2010: Rs. 73,838,634.75

As on 31st March 2011: Rs. 8,92,07,327.52

As on 31st March 2012: Rs. 8,92,07,327.52

24. While learned counsel for EAPL has been unable to explain how the outstanding amount as on 31st March 2011 and 31st March 2012 can be the same, the above statements in the balance sheets are a clear admission by EAPL of the amounts owing by it to Bibby.

25. In Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, the Supreme Court explained that the expression "unable to pay its debts" u/s 433(e) should be taken in the commercial sense in that the company "is unable to meet the current demands." The Court must be satisfied that "the existing and probable assets would be insufficient to meet the existing liability." In IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., , the Court explained that "A determination of examination of the company"s insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company"s liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice u/s 434(1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand." It was again reiterated that "If the debt is an undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency can be seen as relevant as to whether there was a dispute as to the debt, not as a ground in itself, that means it cannot be characterised as a stand alone ground."

26. The Court is satisfied, in the present case, that there is an admission of liability by EAPL and that the defence of EAPL for not paying the amount is not bona fide. The Court is also satisfied about the inability of EAPL to pay its debts.

27. The petition is accordingly admitted and the Official Liquidator ("OL") attached to this Court is appointed as the Provisional Liquidator (PL) of EAPL.

28. A copy of this petition be served on the OL attached to this Court. The OL is

directed to take over all the assets, books of accounts and records of EAPL from the date this order becomes effective as indicated hereafter. The OL shall also prepare a complete inventory of all the assets of EAPL before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required.

29. Publication of the citation of the petition be effected in the Official Gazette, "The Times of India" (English) and "Jansatta" (Hindi) in terms of Rule 24 of the Companies (Court) Rules, 1959 ("Rules"). The cost of publication shall be borne by Bibby. The Directors of EAPL are directed to strictly comply with the requirements of Section 454 of the Companies Act, 1956 and Rule 130 of the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from the date the order is made effective in terms of para 31 below. They will also file affidavits in this Court, with advance copies to the OL, within four weeks thereafter setting out the details of all the assets, both movable and immovable, of EAPL and enclose therewith its balance sheets, profit and loss accounts and copies of the statements of all its bank accounts for the last three years.

30. This order is kept in abeyance for eight weeks to enable EAPL to make payment to Bibby of the aforementioned liability as set out in the petition together with up-to-date interest, failing which this order will become effective and further steps will be taken by the OL in terms of this order. If the payment is not made by EAPL within eight weeks, Bibby will immediately inform the OL to enable the OL to take further steps in terms of this order. In that event, a compliance report be filed by the OL before the next date of hearing. Co. Appl. 1703 of 2012 is accordingly disposed of. The interim orders will continue. List Co. Petition No. 328 of 2011 on 24th September 2013.