

(2009) 11 DEL CK 0067

In the Delhi High Court

Case No : Co. App. 3-4 of 2006 and CM No. 12982 of 2009

Cheran holdings Pvt. Ltd. and Another

APPELLANT

Vs

Data Access (India) Ltd. and Others

RESPONDENT

Date of Decision : 20-11-2009

Acts Referred:

Companies Act, 1956 — Section 433, 434, 531

Citation : (2010) 1 CompLJ 342 : (2010) 114 DRJ 27

Hon'ble Judges : Vikramajit Sen, J; Sunil Gaur, J

Bench : Division Bench

Advocate : Sanjay Jain, Prabhsahay Kaur and Arjun Mitra, for the Appellant; Y.P. Narula and Aniruddha Chaudhary, for Canara Bank, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—Pacific Convergence Corporation Limited has filed a Petition u/s 433(e) and 434 of the Companies Act, 1956 praying for the winding-up of Data Access (India) Limited (for short "DAIL") on the ground that the loans extended by PCCL to DAIL have not been paid back. By the impugned Order dated 18.11.2005 the learned Company Judge has come to the prima facie conclusion that DAIL is indebted to PCCL and is unable to pay the debt; that DAIL has lost its substratum and that it would be just and equitable to order its winding-up; and that there is no business activity of DAIL and no prospects of its revival. The Company Petition has been admitted and citation has been published.

2. The learned Company Judge has also decided several applications, including CA No. 1409/2004 dated 23.11.2004 filed by Canara Bank/Respondent No. 3 before us. It had represented before the Company Judge that it financed the business of DAIL in consortium with Syndicate Bank vide Deed of Hypothecation dated 15.4.2004. As a consequence of these transactions, DAIL owes about Rupees 92 crores to Canara Bank and approximately Rupees 17 crores to Syndicate Bank. The Bank deals in public money and thus to safeguard its interest and secure its security, it was allowed to move the learned Company

Court for appropriate directions once the provisional liquidator was appointed by way of the application, where in the cause of concern ventilated was the alleged diversion of Rupees 75 crores received by DAIL in India. We do not propose to go into the minute details of the transactions between the Applicant Bank and the Syndicate Bank [acting in consortium] with DAIL. Suffice it is to state that the grievance of Canara Bank centres around transfer of US\$17 million from Data Access I&C (America) which admittedly is a 100 per cent owned subsidiary of DAIL. This sum of US\$17 million was received by DAIL in Account No. 1014374 maintained with ABN Amro, Chennai. Canara Bank alleges that in terms of the financial arrangement between the Canara Bank and the DAIL the former had a lien over all Book Debts of DAIL.

3. Accordingly, it had rights/lien over the said sum of US\$17 million received by DAIL in the account maintained by it in ABN Amro. Learned Counsel for the Appellants have stressed upon the fact that the Account with ABN Amro was opened with the consent of Canara Bank. Even though this appears to be correct, we are unable to understand how it compromises or extinguishes or undermines the lien that Canara Bank could exercise over the Book Debts of DAIL as it is explained that the consent for opening the said Account was given for a limited purpose, that is, receiving investors' money and not for receiving any inward Remittance from Data Access America. As we have noted, the sum of US\$17 million have been received by ABN Amro on 19.8.2004 and on that very day it had transferred the entire amount corresponding to Rupees 78.45 crores to Cheran Holdings Pvt. Ltd. (CHPL). This sum of Rupees 78.45 crores was immediately transferred by CHPL, in its Account No. 1103945 with ABN Amro. Instantaneously, CHPL transferred a sum of Rupees 35,30,46,482/- to Cherian Enterprises Pvt. Ltd. (CEPL) holding an Account No. 922322 with ABN Amro; a sum of Rupees 18,05,00,000/- to KCP Associates Holdings Private Ltd. in ABN Amro Account No. 94444; and Rupees 25,00,00,000/- to Sporting Pastime India Ltd. (SPIL) in Account No. 912277 with ABN Amro on 28.10.2004. So far as KCP Associates Holdings Private Ltd. is concerned, it has transferred a sum of Rupees 18,03,00,000/- in favour of Syndicate Bank. SPIL contends, and this is not disputed, that on 23.2.2005 the Income Tax Department appropriated Rupees 17,40,29,511/- and further on 19.8.2005 Rupees 7,59,70,489/-. The learned Company Judge has narrated the circumstances in which DAIL went into financial difficulties, which appear primarily due to action initiated by BSNL. We need not concern ourselves with these events. It has further been held that the sum of US\$17 million, equal to Rupees 75 crores, was received on account of the debt due to DAIL and which was charged/hypothecated with Canara Bank.; on receiving this information Canara Bank, vide its letter dated 13.11.2004, called upon ABN Amro to remit the said amount to it. Vide letter dated 16.11.2004 ABN Amro informed Canara Bank that the funds had been transferred to another account [which we have already adumbrated above], leaving only a balance of Rupees 48,000/- in the account of DAIL. Thereafter, correspondence has been exchanged between two Banks leading to beneficial consequence so far as the

Canara Bank is concerned. In these circumstances, the Canara Bank had prayed before the learned Company Judge that the said sum of US\$17 million should be protected. Thereafter, several other applications have been filed staking claims over the said amount of US\$17 million.

4. The defence of DAIL appears to be that the sum of US\$17 million was received from ODYSSEY America Reinsurance Corporation (ODYSSEY RE) as a loan allegedly on two considerations (a) rollover of loans and bank guarantees with Canara Bank and Syndicate Bank for a period of twelve months and (b) reinstatement of all points of interconnect with BSNL and extension by BSNL of outstanding dues. The learned Company Judge has noted the submission that Hamblin Watsa Investment Council (Hamblin) had made this clarification in their letter dated 12.8.2004 to Data Access America; and a similar advice was rendered to ABN Amro Bank by CEPL by its letter dated 12.8.2004. In the background of the twin conditions mentioned above, Hamblin, by letter dated 18.8.2004, had requested Data Access America to direct its holding company, DAIL to place this sum with Cheran. It is on this basis that the Appellants contend that the sum of US\$17 million was not a Book Debt of Data Access America to DAIL but was a totally distinct transaction over which Canara Bank could not claim any lien/charge.

5. The learned Company Judge has duly adverted to applications filed by CHPL, KCP Associates Holdings Pvt. Ltd., SPIL as well as other enterprises. The learned Company Judge has noted that pursuant to the Consortium Meeting held on 7.9.2004, Canara Bank received letters dated 16.9.2004, 17.9.2004 and 21.9.2004, none of which made any mention of receipt of loan of US\$17 million (Rupees 75,00,00,000/-) from investors. On the contrary, the letter dated 21.7.2004 informs that a sum of Rupees 83.81 crores is due from Data Access America to DAIL as on 31.8.2004. Notice has further been taken of a letter that in November, 2004 DAIL had taken the stand before the Enforcement Directorate and the Revenue Authorities that the new management had fraudulently transferred funds of DAIL to their own companies and that the amount of US\$17 million were to be deposited with Canara Bank. What is extremely significant to us, which has been duly noted, by the learned Company Judge, is that ABN Amro, Chennai, on receiving this sum of US\$17 million on 19.8.2004, had filed an Inward Remittance Certificate (IRC) with Reserve Bank of India on the very same day, declaring that the remittance was received on account of DAIL against outstanding bills for services rendered.

6. The learned Company Judge has recorded that although many judgments were cited on the interpretation to be given to Section 531 of the Companies Act, he considered it inappropriate to delve into them for the reason that a prima facie view shall be taken at that stage. The facts, which were distilled by the learned Company Judge uncontrovertibly, are the following:

(a) The amount was received in the account of the company maintained with ABN AMRO Bank. (b) The amount was received through its subsidiary Data

Access America Inc.

Whether it was a loan given by Odyssey Re, that too with conditions, is a matter which needs a thorough probe. It is also possible that as Data Access America has to make substantial payments to the company, it borrowed the money from the said parties for making payment to the company.

(c) Although it is alleged that the money was to be given by way of loan by CHPL/ Odyssey with certain conditions, even when this money was received on 18th August, 2004, the correspondence on record which is highlighted by the bank shows that much after this date also there were discussions about the investors infusing Rs. 75 crores indicating that such a money has yet to come.

(d) This can be inferred from the shareholder.s agreement dated 26th August, 2004, consortium meeting dated 7th September, 2004 and follow up letters dated 16th, 17th and 21st September, 2004 received by the bank. Even in reply dated 19th November, 2004 counsel for company M/s Dua Associates Ltd. did not refute the allegation of the bank that money was received from Data Access America Inc. in the account of the company.

(e) Although as per the representations made, investors were to infuse Rs. 75 crores, money received in US\$17 million, i.e. Rs. 78.45 crores.

(f) After receiving the amount, ABN AMRO filed inward remittance certificate with RBI on 19th August, 2004, i.e. the same date declaring that the remittance was received in the account of the company against the outstanding bills of services rendered.

(g) No permission of RBI has been obtained by any party for lending foreign exchange to an Indian Company.

7. An Order has thereafter been passed directing that the amount which has been transferred from ABN AMRO Account No. 1014374 of the company to CHPL and other companies shall be remitted back by those parties to the account of the company maintained with ABN AMRO Bank. Needful in this respect shall be done within two weeks. After receiving this amount the ABN AMRO Bank shall remit this amount to Canara Bank. It is because of the admitted liability of the bank and charge of the bank over this money. Furthermore, in case it is found ultimately that the money is to be refunded to Odyssey Re etc., appropriate orders can be passed directing Canara Bank to refund the amount and the bank has sufficient means to carry out such directions. Appropriate orders shall be passed in the company petition as to how this amount is to be dealt with depending on the nature of the final orders passed in the company petition.

8. Learned Senior Counsel for the Appellants has laid great emphasis on the fact that the Bank has initiated proceedings against DAIL in Debt Recovery Tribunal; as they are outsiders to the Winding-up Petition they have no right to make any claim before the learned Company Judge. It is, therefore, argued that the learned Company Judge gravely erred in adjudicating upon Canara Bank.s claim

and in directing the Appellants to deposit the withdrawn amount in ABM Amro Account. The said amount is directed to be transferred by ABN Amro Bank to Canara Bank with a Caveat that if it is ultimately held that the money is to be refunded to the respective parties, Canara Bank can be directed to effect restitution. We are unable to agree with the contention of Mr. Jain, learned Senior Counsel, since the Order passed by the learned Company Judge is not an adjudication of the claims of the Bank but an interim direction, on the basis of a prima facie view, only to secure the money that had come in the Account of Company in winding-up, over which the Bank had a lien.

9. Learned Senior Counsel appearing for the Appellants has also endeavoured to convince us that the prima facie findings of the learned Company Judge are erroneous. We have perused the documents on record in addition to the detailed and lucid impugned Order. We are not at all persuaded that these prima facie findings are incorrect. The submissions in this regard are rejected.

10. The question that immediately follows is whether the learned Company Judge had fallen into error in returning a prima facie finding. Learned Senior Counsel for the Appellants has vociferously argued that the Appeal should be allowed to the extent of remanding the matter to the learned Company Judge with the direction that a final finding with regard to the nature of the remittance of US\$17 million should be arrived at. He has further submitted that till that finding is reached, contempt proceedings should be held in abeyance. We have already reproduced the operative part of the impugned Order and in that regard we are of the firm opinion that the learned Company Judge was right in returning only a prima facie finding vis-a-vis factual matrix. The IRC sufficiently is indicative of the nature of remittance of US\$ 17 million. The conclusion arrived at by the learned Company Judge is further fortified by the fact that the Inward Remittances in the nature of loans are forbidden without the prior consent of the RBI. These two considerations should not be taken as the sole reason for our affirming the impugned Order. It will be in the interest of justice that a further and detailed investigation is carried out by the Official Liquidator. This is possible only after the admission of the winding-up petition. Passing interim orders are, however, not precluded, especially since it is the funds of the company in liquidation that are in focus.

11. A number of cases have been cited before us as were cited before the learned Company Judge. We do not think it relevant to discuss these precedents in view of our conclusion that it is only a prima facie view that should be taken by the learned Company Judge, to be followed by detailed investigation by the Official Liquidator.

12. It is in these circumstances that we find the Appeals are devoid of merit and are dismissed accordingly. Pending Applications also stand dismissed.