(2013) 12 KAR CK 0354

In the Karnataka High Court

Case No : Company Petition No. 134 of 2009

Cronus Investments PTE Limited — APPELLANT

Vs

Calypso Foods Private Limited — RESPONDENT

Date of Decision : 03-12-2013

Acts Referred:

Citation : (2013) 12 KAR CK 0354

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : C.K. Nanda Kumar, for the Appellant; G.L. Vishwanath, for the Respondent

Final Decision : Disposed Off

Judgement

Anand Byrareddy, J.—Heard the learned Counsel for the petitioner and learned Counsel for the respondent. The petition is filed under Sections 433(e) and (f) of the Companies Act, 1956. It is the case of the petitioner that it is an investment based company at Singapore and the respondent - company is registered and incorporated under the Companies Act, 1956, having its registered office at Hassan, Karnataka. The respondent is engaged in the business of horticulture.

2. The authorised share capital of the respondent - company is Rs. 7,00,00,000/- divided into 3,60,00,000 equity shares of Re. 1/- each, amounting to Rs. 3,60,00,000/- and 34,00,000 preference shares amounting to Rs. 3,40,00,000/-. The issued, subscribed, and paid-up capital of the respondent is Rs. 3,73,69,511/- divided into 1,86,19,511 equity shares of Re.1/- each amounting to Rs. 1,86,19,511/- and a further 18,75,000 preference shares amounting to Rs. 1,87,50,000/-.

The main objects, for which the respondent - company was incorporated, as set out in its Memorandum of Association, are as follows:--

(a) to carry on the business of growing, processing and selling fresh and processed fruits and vegetables and other food products including nutraceuticals.

(b) to carry on the business of selling and distributing seeds, fertilizers, pesticides, agricultural implements, agricultural inputs and other related input material and services.

(c) to provide consultancy services in the agricultural and food processing areas and also to provide advice, services and consultancy in other related areas.

(d) to deal, trade and export and import agricultural goods, food products and services.

(e) to establish, maintain and offer services of related infrastructure like cold stores, grading and packing units, quality laboratories and research stations.

(f) to develop, maintain and sell appropriate agricultural information technology products and services, including business process outsourcing.

3. It is the case of the petitioner that in March 2008, the respondent had approached the petitioner seeking finances for its business by purchasing shares of the respondent - company. The petitioner and the respondent held discussions, following which a term sheet dated 13.5.2008 came to be signed between the petitioner and the respondent. It was agreed that the petitioner would make investment in the form of convertible preference shares. Each convertible preference share was to have a face value of Rs. 100/- and was to carry dividend. The preference shares were to be made fully convertible shares within a period of seven years from the date of issue.

The petitioner - company had remitted the advance share subscription money of US$ 74993.50 based on the assurances of the respondent - company. This was acknowledged at the board meeting held on 25.6.2008. The term sheet dated 13.5.2008 had set a deadline of 31.5.2008 as being the date on which the transaction had to be completed. This was not met. Accordingly, the petitioner advanced a further sum towards the share subscription money and remitted an amount of US$ 621,973, which is evidenced by a Foreign Inward Remittance Certificate dated 18.7.2008.

The transaction could not be consummated and the parties agreed to terminate the transaction as of October 2008. But instead of returning the money advanced pursuant to the termination, the respondent is said to have delayed repayment. After further exchange of correspondence, the respondent was called upon to pay the amount. The petitioner - company had also brought to the attention of the Reserve Bank of India (RBI) that there was violation of the Foreign Exchange Regulations, the RBI, which was in the know of the transaction, had also made a demand on the respondent to repay the amount, which was not complied with. This having been highlighted in the exchange of correspondence, there was no further payment by the respondent. It is in that background that the petition is filed seeking winding up of the respondent - company and for consequential benefits.

4. Notice having been ordered on the petition, the respondent entered

appearance and had filed statement of objections.

5. The petition was heard regarding admission on 13.1.2010. After hearing the parties, this court admitted the petition and ordered advertisement of the same. At the request of the respondent, the advertisement was deferred till 20.1.2010. Thereafter, statement of objections was filed, which was taken on record and it was sought to be contended that the respondent was commercially solvent and sought to produce its provisional accounts and on which note, the matter stood adjourned.

Thereafter, the respondent, apart from the contentions raised in the statement of objections, has contended that it was an agricultural based industry and having regard to the phenomena of global recession, the company was pleading that it be bailed out of the situation and if some reasonable time was afforded, the respondent would be in a position to discharge the debt and the respondent could not be written-off as being commercially insolvent. And especially, having regard to the large number of workmen, who would be affected by virtue of such winding up, no useful purpose would be served in the winding up order being made. However, the respondent, on that note, undertook to repay the dues to the petitioner if time is granted till March 2010. This court then passed a peremptory order holding that the failure to adhere to the order would lead to the winding-up of the respondent company.

6. The respondent approached the Board of Industrial and Financial Reconstruction (BIFR) during April 2010, in Reference No. 7/2010 claiming to have a negative net worth and this court upon being informed of the same, suspended the proceedings. Thereafter, on 27.4.2011, the BIFR is said to have dismissed the reference recording a finding that the respondent had manipulated its accounts to overcome the proceedings before this court and accordingly, an order was passed. The respondent did file an appeal against the same before the appellate authority for Industrial and Financial Reconstruction. The appeal was dismissed as on 8.4.2013. It is thereafter that this court directed advertisement of the petition.

Pursuant to the advertisement, there are no other respondents who have entered appearance. It is in this background that the matter has now come up for final hearing.

Though there is a defence taken that the money in question was not towards the purchase of preferential shares, but the money was provided by way of investment in equity shares and not as claimed by the petitioner, however, it is to be noticed that there was no replay made to the notice issued u/s 434 of the Companies Act, 1956 and it is only by way of statement of objections that such a contention is taken.

Notwithstanding the objection raised and the issue that may arise out of such a contention, it is also to be noticed that the respondent did voluntarily offer to settle the debt at a point of time and thereafter, there were proceedings before the BIFR after the petition was admitted and a peremptory order was passed. This would indicate that the petitioner''s bona fides were not suspect and therefore, the question of adjudicating on the possible issue that might arise, by virtue of the objection filed, may not be material. Accordingly, the petitioner has certainly made out a case as to the respondent''s inability to pay its debt and of commercial insolvency.

Therefore, the petition stands disposed of. The respondent-Company is ordered to be wound-up under the provisions of the Companies Act, 1956. The Official Liquidator attached to this Court shall act as the liquidator of the respondent-Company and forthwith take charge of all the property and effects of the said Company. The Official Liquidator shall cause a sealed copy of this order to be served on the company by pre-paid registered post. The petitioner shall advertise within 14 days from this date a notice in the prescribed form, of the making of this order, in ''THE HINDU'', English daily newspaper and shall deposit Rs. 50,000/- (Rupees Fifty Thousand) with the Official Liquidator towards initial expenses. The petitioner shall serve a certified copy of this order on the Registrar of Companies not later than one month from this date.