

(2014) 03 BOM CK 0083

In the Bombay High Court

Case No : Company Petition 432 of 2010 with Company Application No's. 586 of 2010 and 383 of 2011

Deutsche Bank AG.

APPELLANT

Vs

Finolex Industries Limited

RESPONDENT

Date of Decision : 28-03-2014

Acts Referred:

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

Citation : (2015) 2 BomCR 790

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : V.V. Tulzapurkar, Mr. H. Jayesh, Mr. Anupam Prakash, Mr. Ankur Shah instructed by M/s. Juris Corp, for the Appellant; F.E. Devitre , C.S. Kapadia, Manik Joshi instructed by y M/s. Chitnis and Co., for the Respondent

Final Decision : Dismissed

Judgement

G.S. Patel, J.

I Overview

1. Deutsche Bank AG, the petitioner ("Deutsche Bank"), claims that an amount of US\$ 21,001,543.71 (plus interest) is due to it as of 1st May 2010 from the respondent, Finolex Industries Ltd. ("Finolex") under a derivative transaction. This transaction is said to accord with a 2002 ISDA Master Agreement, one that is incorporated by reference. Finolex inter alia manufactures PVC resin. For this, it needs various chemicals that it must import as these are not locally available. The value of its annual imports range between US\$ 100-200 million. Finolex pays for its imports in US dollars. Resultantly, its rupee import cost depends on the dollar-rupee (USD/INR) exchange rate at any given time. Finolex's purchases are also on credit, often for up to as much as year from the supply date. The raw material price is pegged (in US dollars) at the time the order is placed. Since Finolex makes actual payment at a later date, the rupee amount it uses in payment depends on the USD/INR exchange rates. At the same time, Finolex's

domestic sale prices do not fluctuate in tandem with currency exchange rate differentials. This requires Finolex to hedge or otherwise protect itself against foreign currency fluctuation risks.

2. That Finolex's transactional volumes are very high is undisputed. Finolex is a public limited listed company. Its shares trade on both the Bombay Stock Exchange and the National Stock Exchange. It has a market capitalization of just under Rs. 1000 crores. It is the largest manufacturer of PVC pipes in India, and the second largest manufacturer of PVC resin. In 2011, it had over 170,000 share holders, a turnover of Rs. 1,650 crores, a net profit of Rs. 132 crores and a gross block of Rs. 1600 crores. With over 1000 employees, it had (in 2011) reserves of over Rs. 450 crores, fixed assets worth over Rs. 1500 crores, a net worth of nearly Rs. 600 crores and book value fixed assets of over Rs. 2,000 crores. It pays substantial amounts in tax, both direct and indirect. It has credit facilities of over Rs. 1400 crores from different banks.

3. In 2006, the Reserve Bank of India ("RBI") introduced important measures to validate and regulate derivative transactions. Although one of Finolex's defences is that the transaction in question violates the RBI Master Circular in this regard, I do not think it is necessary, in the view that I have taken, to examine this; Finolex has other defences that are, I believe, more than sufficient.

4. Briefly stated, Deutsche Bank's case, as formulated by Mr. Tulzapurkar, learned senior counsel, is this: there can be no disputing the legality or validity of the derivative transaction in question. This was not the first derivative transaction between Deutsche Bank and Finolex; it was not even the first derivative transaction of its kind. There were several previous derivative transactions, all undisputed and uncontroversial, and the present transaction of 9th August 2007 had a proximate precursor of only a few days earlier, 6th August 2007, one that worked in Finolex's favour in a substantial amount. The present transaction did not. It was twice restructured, at Finolex's request. There is no breach of any statutory or regulatory requirement and there is, therefore, no defence to the claim. That the present derivative transaction was in US Dollars and Japanese Yen makes no difference whatever; Finolex was neither stranger nor neophyte to such transactions. What Finolex attempts is, therefore, to deny the undeniable. Specifically, the transaction in question was a "target profit forward" product. Among other things, it provided for a knock-out level or barrier event, a specified spot rate of the Japanese Yen to the US Dollar. That level was never reached after the parties entered into the transaction. This is in sharp contrast to the immediately previous transaction that did get "knocked out" when the Japanese Yen crossed the barrier event mark specified in that transaction vis-à-vis the US Dollar. In the present case, it is not in dispute that the US Dollar to Japanese Yen (USD/JPY) knock-out level was never reached at any time after the contract was executed and for its two-year (104-week) tenure. The result is Finolex's indebtedness to Deutsche Bank computed exactly in terms of the contract at the contract's maturity.

5. Mr. DeVitre, learned senior counsel for Finolex, disputes this formulation of the case. He raises several defences, including that this is a wagering contract, and hence illegal, and that it is contrary to statutory and regulatory requirements and so on, defences that are not, he says, yet decided, though Mr. Tulzapurkar says otherwise. More fundamentally, on facts, he questions whether the present transaction did or did not get knocked out and when. He points to the fact that, admittedly, the Japanese Yen did cross the barrier level mark specified in this particular transaction. That is not in dispute. What Deutsche Bank says is that the barrier event occurred before the contract was executed; the time of execution, and the reason it was executed at that time and not earlier are matters that on Deutsche Bank's own showing are dependent on it proving certain "oral instructions" it claims to have received from Finolex, and which Finolex denies. The entire edifice of Deutsche Bank's claim is built on, and only on this; viz., that it is accepted by both parties that there were oral instructions from Finolex to Deutsche Bank to execute the transaction only when the Japanese Yen reached a particular mark; that the Yen reached that mark at a certain time although it had crossed the barrier mark earlier; and that the transaction was executed at a specific time, 4:30 pm, on 9th August 2007. If Finolex disputes this, and if it is shown that Finolex has never accepted it, and if, further, Deutsche Bank cannot establish this by cogent material in this petition, then its case for winding up must fail. It cannot then be said that there is no defence, or the defence is implausible, insubstantial or illusory. Indeed, it is Finolex that initiated civil recovery proceedings against Deutsche Bank well before Deutsche Bank filed its (still) pending applications before the Debt Recovery Tribunal and the present petition.

6. I have heard both Mr. Tulzapurkar and Mr. DeVitre at some considerable length. On a careful consideration of their respective submissions and of the material before me, I have not been persuaded to hold that the defence is entirely without merit or substance. The factual controversy that Mr. DeVitre raises seems to me to be fundamental and determinative of Deutsche Bank's case. That assessment must necessarily be one that requires evidence, for, as the following discussion shows, there are many matters of critical detail that must be properly proved. Therefore, it has not been necessary to consider the other submissions that Mr. DeVitre attempted; this much, on the factual controversy, is, in my view, sufficient to warrant a dismissal of the petition.

II Background

7. Since 2005, Deutsche Bank provided banking facilities to Finolex, including packing credit facilities. Finolex also entered into a number of derivative transactions with the Deutsche Bank. There were about eight or ten such transactions, in the form of cross-currency swaps and knock-in and knock-out forwards. Finolex received some Rs. 5.90 crores (approximately) under some of these transactions, and paid to Deutsche Bank about Rs. 5.32 crores under others. Mr. DeVitre says that every one of these was intended to hedge Finolex's

foreign currency risks associated with its import liabilities, and they were all linked to the currency in US dollars of its underlying import/export transactions. These derivative products were of what he describes as "the plain vanilla" flavour, which is to say they were innocuous, even bland, and lacked-for want of a better phrase--the deceptive tang and exotic fruitiness (Mr. DeVitre says "toxicity") of the two later offerings.

8. In mid-2007, Finolex apprehended that the Indian rupee would significantly weaken against the US dollar. It needed to limit its exposure to a foreign currency exchange rate differential. According to Finolex, Deutsche Bank predicted a strengthening dollar. It invited Finolex to enter into a "USD/JPY target profit forward transaction", a cross-currency swap in dollars and Japanese Yen. A term sheet was signed on 6th August 2007. The trade date was 6th August 2007, and the "deal" had a life of two years, till 5th August 2009. The deal envisaged something called a "strike rate" for the Japanese Yen and specified different strike rates over a time spread of the first four weeks, the next five weeks and so on, over a 104-week horizon. The transaction would end or get knocked out if one of two events occurred: the target profit of 9900 FX points was achieved or if the USD/JPY rate crossed 1:118.70 (one US Dollar to 118.70 Japanese Yen) at any time from the trade date.

9. This deal got "knocked out" or terminated the very next day, 7th August 2007 even before formal documentation was signed: the Japanese Yen crossed the 118.70 barrier mark. Deutsche Bank became liable to pay paid Rs. 1,21,14,000/- to Finolex as a result, and it paid this amount on 8th August 2007. Formal documentation was executed only on 24th August 2007.

10. Having nibbled at this apple, one that it now describes as poisoned, Finolex was quick to accept Deutsche Bank's offer of an identical second transaction the very next day, 9th August 2007. The terms were substantially similar to the first deal, except that the barrier event or knock out level was set at a 119.30 Japanese Yen to the US Dollar. This level is only marginally below the previous knock level of 118.70 Japanese Yen to the US Dollar, struck just the day before. The deal was so structured that the reward-to-risk ratio for Finolex was 1:120; if what Finolex now describes as a "gamble" on the US dollar's currency rate vis-?-vis the Japanese Yen worked against it (i.e., if the US Dollar weakened against the Japanese Yen), Finolex would have an almost unlimited exposure.

11. Essentially, the transaction proposed:

(a) That the US Dollar would strengthen against the Japanese Yen.

(b) As long as the USD/JPY rate remained at 1:101 (USD 1.0 being equal to ? 101) for four weeks from 9th August 2007, then Deutsche Bank would pay Finolex the difference between the Japanese Yen spot rate at 3:00 pm Tokyo time and ? 101 multiplied by the notional amount.

(c) If the Yen moved to or above ? 119.30 at any time from the trade date, the

deal would be knocked out.

(d) If the US Dollar weakened against the Japanese Yen (i.e., the Yen fell below the 101 level), then Deutsche Bank would receive the difference between ? 101 and the trade rate at 3:00 pm Tokyo time multiplied by the notional amount.

12. The material difference between the first and second deals was only in the setting of what was called the Barrier Event. In the first transaction, the barrier event was the Japanese Yen trading at 118.70 to the US Dollar; in the second, the event was the Yen trading at 119.30 to the US dollar. The other terms were largely the same (except, of course, the tenure dates). The trade date was specified as 9th August 2007. The final fixing date was 6th August 2009, and the final settlement date was 10th August 2009.

13. It is at this point, 9th August 2007, that the rival narratives diverge. Finolex claims that the barrier event, the Japanese Yen's spot rate, occurred on that very day: it traded over 119.30 on 9th August 2007, and the second deal thus got knocked out on the very date of the contract. This, Finolex says, was a matter that was actively kept from it by Deutsche Bank. Finolex did not track the movement of Yen, but relied on Deutsche Bank to inform it, as it was obliged to do, and as it had done in the past. On 24th August 2007, Deutsche Bank sent Finolex confirmation documents, which Finolex says it signed in good faith. Not only did Deutsche Bank not inform Finolex of the first-day-knock-out, it allowed Finolex to twice restructure the deal by lowering the knock-out levels, and this required Finolex to pay two tranches of nearly Rs. 7 crores.

14. Finolex claims that it was not till June or July 2009 that it realized the "true" nature of the 9th August 2007 transaction. On 30th July 2009, it brought suit in the court of the Civil Judge, Senior Division, Pune inter alia seeking a refund of all amounts it had paid till then under that transaction and impeaching the entire transaction. A month later, on 24th August 2009, Deutsche Bank filed an Original Application No. 160 of 2009 before the Debt Recovery Tribunal against Finolex. In October of that year, as Finolex filed an application for interim relief before the Civil Judge in Pune, Deutsche Bank obtained an ex-parte ad-interim injunction from the Debt Recovery Tribunal restraining Finolex from creating any encumbrances on some of its properties. These proceedings were then prosecuted further; appeals were filed before the Debt Recovery Appellate Tribunal and, by April 2010, wilful defaulter proceedings had also commenced. I am not in this petition concerned with the details of these proceedings. It is sufficient to note that the battle lines have been drawn, and that Deutsche Bank has invoked its remedies in other forums, and that Finolex, for its part, has also initiated action against Deutsche Bank.

15. The issues in those proceedings must, inevitably, overlap the factual conspectus of this petition. The question here, however, is whether on the facts set out in the petition Deutsche Bank can be said to have made out a case for winding up; and, equally, whether Finolex's defences can be said to be so utterly

without merit or substance as to warrant an order of winding up.

III Deutsche Bank's Submissions

16. Mr. Tulzapurkar debunks Finolex's contentions, especially those about it being kept in the dark about the barrier event occurring on the trade date itself. All of this is, he says, a smokescreen, and that is evident from the manner in which the dates fall. Given that Finolex had done several currency-related derivative transactions before, no matter of what gustatory description, it and its officers could not possibly be innocents abroad as is now contended. That they did not track currency movements is ex-facie implausible, regard being had to the volumes involved, for these are not trivial. The court should be slow to accept such protestations of innocence. Finolex's familiarity with the terrain is evident from own financials for 2006-2007, which show large volumes, of over Rs. 737 crores in derivative transactions alone. Admittedly, the second deal was twice restructured in March and May 2008. Both restructurings were at Finolex's behest, and fresh term sheets were signed. Finolex then sought RBI permission for a third restructuring, but without a cash settlement. It wrote to Deutsche Bank, too, in this regard. Its application for the third restructuring to RBI was of 16th April 2009. That means that for three years, not a short time by any measure, Finolex had no complaint whatever about the second deal, the transaction that is the subject matter of this petition. It is only after RBI refused permission that Finolex for the first time, on 17th June 2009, barely two months before the maturity of the second (and twice restructured) transaction questioned the nature of the product, Deutsche Bank's conduct and how Finolex's liability arose. Deutsche Bank replied to Finolex on 29th June 2009 stating its position, and it was only then that Finolex launched its Regular Civil Suit No. 1240 of 2009 on 30th July 2009 assailing the entire transaction.

17. Finolex's submission that the second transaction was knocked out before it even began is entirely without substance, according to Mr. Tulzapurkar. The transaction was entered into after 4:30 pm on 9th August 2007. The Japanese Yen never crossed the barrier event mark at any time after that day, though it did so earlier that day, before the parties entered into the transaction. What Finolex posits, Mr. Tulzapurkar says, is some sort of anticipatory knock-out, and this is based on, and only on, Finolex's claim that it is an abecedarian in these matters. That argument is destroyed by Finolex's previous and subsequent conduct both. Indeed, its applications for restructuring could only have been based on its own knowledge of currency spot rates and trades.

18. There is nothing, Mr. Tulzapurkar submits, but vacuity and a duplicitous claim of na?vet? in Finolex's response. This, he says, is no defence at all, far less a substantial or bona fide defensive. If ever there was a defence that is speculative, specious, spurious and illusory, it is this.

19. To Mr. DeVitre's submission that, having filed a proceeding before the Debt Recovery Tribunal for its dues Deutsche Bank must await that decision, for it is

only then that Finolex's debt, if any, can be said to be ascertained, Mr. Tulzapurkar relies on the decision of a Division Bench of this Court in *Viral Filaments Ltd., Mumbai Vs. Indusind Bank Ltd., Mumbai*, That decision held that the filing of a recovery action by a bank or a financial institution before the Debt Recovery Tribunal, invoking its special and exclusive jurisdiction, does not bar an independent petition for winding up under the Companies Act, 1956. A winding up petition need not be preceded by an adjudication by the Debt Recovery Tribunal of the company's liability, in view of the statutory, though rebuttable, presumption of a company's "inability to pay its debts". There can be no disputing this proposition, and the decision is binding.

20. As to the question of the legality of such derivative transactions, Mr. Tulzapurkar relies on the decision of a learned single Judge of this Court in *Kotak Mahindra Bank Limited Vs. J.B. Diamonds Limited*, In paragraphs 10 to 20 of that decision, Vazifdar, J. considered the applicable law and held that the derivative transactions, substantially similar to the ones in question in this petition, were permissible in law. This is also the view of another decision of the Madras High Court in *Rajshree Sugars and Chemicals Limited Vs. AXIS Bank Limited*, formerly known *UTI Bank Limited*, I must note that though Mr. DeVitre proposed to make his submissions on this aspect also, I did not think that necessary in view of my findings on the facts of this case. Mr. Tulzapurkar also fairly points out that the decision in *J.B. Diamonds* was set aside by consent in appeal, where the matter was compromised.

21. Mr. Tulzapurkar also relies on the decision of another learned single Judge of this Court in *ICICI Bank Ltd. Vs. Sundaram Multi Pap Ltd.*, where, in relation to transactions similar to the ones in question in this petition, the submissions that the transactions were void and illegal were repelled.

22. The elaborate discussion in *ICICI Bank Ltd. v. Emcure Pharmaceuticals Ltd.*¹ by a learned single Judge of this Court addresses a wide range of issues in a matter that, prima-facie, is very close to the one at hand. S.C. Dharmadhikari, J. noted and repelled the arguments on illegality and fraud² holding that in a winding up petition, there is no question of the court investigating allegations of fraud. If there is one, it is for the company to establish in civil proceedings with proper pleadings and proof. "It is too late in the day for the respondent to urge that there were no underlying transactions which expose them to risks of foreign currency and, therefore, to hedge such risks that the derivatives were undertaken," said the Emcure court; and this is one of the defences that Mr. DeVitre once again attempts to mount. Emcure held that such defences were neither bona fide nor substantial and therefore admitted the petition. Mr. Tulzapurkar submits that the present petition is indistinguishable from Emcure, and the same result must follow.

23. As to the issue of penalties having been imposed on various banks by the regulatory body, a matter noted in Emcure, Mr. Tulzapurkar relies on the decision of the Supreme Court in *B.O.I. Finance Ltd. Vs. Custodian and Others*, to submit

that these penalties are or were imposed for general delinquency in complying with regulatory standards. The imposition of penalties does not, ipso facto, invalidate a contract.

IV Finolex's Submissions

24. Mr. DeVitre questions the very basis of the transaction in question. For, he says, previous derivative transactions were linked to corresponding credit facilities. The relationship with Deutsche Bank commenced with "ordinary" (in his words, "plain vanilla") derivatives in US Dollars or Euro. Each party paid the other as the transactions demanded. The net gain to Finolex, over time, is about Rs. 30 lakhs. The 6th August 2007 transaction, the first of the two deals of this type, were cross-currency swaps between the US dollar and the Japanese Yen. Finolex has no imports payable in Japanese Yen. It is not the currency of import. Both these deals, Mr. DeVitre says, were styled as "hedging" transactions though they were not in the currency of Finolex's commercial imports. They were, instead, based on the achievement of a profit target. No genuine hedge, properly so called, can have a profit target. A genuine hedge would protect the party against an exchange fluctuation. These two deals were materially different, in that what Deutsche Bank "sold" Finolex was based on a proposition that if the Japanese Yen traded above a certain level against the US dollar, it would get knocked out. If Deutsche Bank had to pay Finolex, it would pay the difference between the spot rate and the strike rate multiplied by a certain factor. Conversely, if Finolex was required to make payment to Deutsche Bank, the amount due was not equivalent to the first scenario; instead, Finolex would have to pay Deutsche Bank twice the amount. This was, therefore, a leveraged product.

25. The immediate precursor of the present deal was of 6th August 2007. It reached the barrier event the very next day, and Deutsche Bank paid Finolex about Rs. 1.2 crores. The documents for both transactions were executed only after 9th August 2007, the date of the second transaction. One of Deutsche Bank's contractual obligations, Mr. DeVitre says, was to inform Finolex in writing if the barrier event was breached on any date, including the trade date. If it is shown that Deutsche Bank did not so inform Finolex, and also shown that the barrier event was breached, then two consequences must follow: the deal is knocked out, and Finolex has no liability to Deutsche Bank.

26. Much of Mr. DeVitre's argument centres around the Term Sheet signed on 9th August 2007. Before I consider that document, I should, perhaps, outline the nature of the transaction as I understand it. This is an extremely evolved derivative product, a variant on an over-the-counter (OTC) cross currency swap. In a normal, or standard, cross currency swap, the parties exchange equal principal amounts (this principal exchange is notional). At a defined maturity, these notional principals are swapped in the two currencies. The "target profit forward" deals operate differently. Here, there is a two-year (104 week) event horizon. During this time, the parties nominally exchange amounts on a weekly

basis (the "fixing dates"), Finolex paying amounts in Japanese Yen and Deutsche Bank in US Dollars. Who is indebted to whom weekly depends on the spot rate of the yen against the dollar at 3:00 pm Tokyo time (about 11:30 am IST), and the contractually defined settlement or strike rate. All weekly net payments are carried forward to the time of maturity of the agreement (the notional principals are not actually exchanged on the weekly basis). The contract also specifies a knock-out level. This is the barrier event. Should the USD/JPY rate exceed this level at any time after the trade date, the deal is "knocked out". At that time, net payments are made by the bank to the constituent or client (Finolex). The contract also provides for a target profit barrier. On the footing that the barrier event is never reached (USD/JPY never exceeding the prescribed barrier limit), the contract ends when a "barrier of 9900 FX points" is achieved. This determinant is a computation of the spot exchange rates above the weekly/periodic strike rates, called weekly target profits. Both the bank (Deutsche Bank) and the constituent or client (Finolex) also have termination options with conditions attached. In the present case, Finolex's payments to Deutsche Bank were linked to the Japanese Yen, a currency that was expected to weaken against the benchmark US Dollar over a defined time horizon. Over a two-year event window, Finolex expected to be on the positive side as the US Dollar strengthened against the Japanese Yen. If those expectations were belied, and the Japanese Yen's trading rates did not move in the anticipated manner, Finolex stood to lose a very great deal of money.

27. The term sheet in question is Exhibit "B" to the petition. The crucial terms are these:

- (a) The trade date is 6th August 2007.
- (b) The "fixing dates" are 104 weekly fixing dates;
- (c) A "settlement date" is two business days following each fixing date.
- (d) Periodic "exchanges" are stipulated for Settlements 1 to 8 and then for Settlements 9 to 104.
- (e) Strike rates for each weekly "band" are defined: For weeks 1 to 4, for instance, the strike rate is 101 Yen to the US Dollar.
- (f) The target profit barrier is 9900 fx points.
- (g) The termination conditions are two: (1) if the target profit barrier is achieved; or (2) the USD/JPY trades at or above 118.70 at any time from the trade date.
- (h) There is then a provision called the "USDJPY Fix", and it reads thus:

The bid side of the USD/JPY foreign exchange rate, expressed as JPY per USD 1.00, as determined by the Calculation Agent with reference to Reuters page TKFE at 3:00 pm Tokyo time on each Fixing Date. If the rate is not available, it will be determined by the Calculation Agent acting in good faith and in a

commercially reasonable manner.

28. Mr. DeVitre then draws attention to the confirmation sheet for the 9th August 2007 transaction at Exhibit "F" to the petition. But for the knock-out or barrier rate and the dates, the terms are otherwise materially the same. Here the knock-out level was JPY 119.30 per USD at 3:00 pm Tokyo time (as opposed to JPY 118.70 per USD in the previous 6th August 2007 transaction). The "Calculation Agent" is defined to be Deutsche Bank, and "Party B" is Finolex. Clause 5 of the Confirmation Sheet specifies the Knock Out Provisions:

5. Knock Out Provisions:

(i) If the Spot Rate is, on any Fixing Date, from and including the Trade Date to and including 06 August 2009 greater than or equal to the Knock-Out Level (a "Barrier Event") then upon the occurrence of such Barrier Event, the FX Transaction relating to that Fixing Date and all FX transaction with a Fixing Date after such a Fixing Date (the "Knock Out Transactions") shall terminate and be of no further effect and no further amounts shall be payable by either parties in respect of the Knock Out Transactions.

(ii) In determining whether a Barrier Event has occurred, a particular Spot Rate shall be disregarded if the Calculation Agent, acting in good faith, considers that it would not be commercially reasonable to take account of it. Upon the occurrence of a Barrier Event, the Calculation Agent shall notify Party B orally (and, if requested, shall confirm such notice in writing by telex or telecopy) of the occurrence of the Barrier Event and provide details the occurrence of such Barrier Event. A failure to give such notice shall not however prejudice the occurrence of the Barrier Event.

29. What Mr. DeVitre contends is that, unbeknown to Finolex, but very much known to Deutsche Bank, the 9th August 2007 transaction got knocked out that very day as the Japanese Yen crossed the barrier event mark of ?119.30 to the US Dollar. This event was never communicated by Deutsche Bank to Finolex, either orally or in writing. Instead, Deutsche Bank led Finolex to believe that the Barrier Event had not been breached; and it is not disputed that after 9th August 2007, it has not in fact ever been breached. Evidently, this is pivotal to Mr. DeVitre's case. For, if the Barrier Event had indeed been breached as he says, then the transaction did get knocked out.

V Analysis & Findings

30. It is in this context that the averments in the petition as to the 9th August 2007 transaction are material. This is how paragraph 8(aa) of the petition reads:

8(aa) The Company had entered into the 9th August Transaction by issuing specific instruction that the 9th August Transaction was to be entered into only when the rate of USD/JPY reached 118.55. On 9th August 2007, the USD/JPY level opened at about 119.64 and it was only in the evening after 4:30 pm that the level of USD/JPY reached 118.55 and, therefore, the 9th August Transaction

as evidenced or set out in the Confirmation for the 9th August 2007 Transaction, was entered into as desired and instructed by the Company. It is submitted that the 9th August 2007 Transaction being commercial transaction involving international currencies (USD and JPY) was entered into and had come into effect at a specific time. The 9th August 2007 Transaction was never knocked out from and after the 9th August 2007 was entered into on 9th August 2007, as subsequent to the entering of the 9th August 2007 Transaction and till the expiry date of the 9th August 2007, i.e., 6th August 2009, the Barrier Event (being JPY to USD reaching 119.30) stipulated in the Confirmation for the 9th August Transaction was never reached/touched. The Petitioner states that under the 5th August 2007 Transaction the Petitioner had intimated the Company on the occurrence of the Barrier Event and the Petitioner has paid INR 12,114,000/- (Indian Rupees Twelve Million One Hundred and Fourteen Thousand Only) to the Company and the Company has received the sum of Rs. 12,114.000/- (Indian Rupees Twelve Million One Hundred and Fourteen Thousand Only). Hence, the Petitioner has never withheld any information nor has been without disclosing the occurrence of any barrier event to the Company. Even in respect of the 9th August Transaction and confirmed by Confirmation for the 9th August Transaction, the Company has till date received INR 11,063,005/- (Indian Rupees Eleven Million Sixty Three Thousand and Five Only) from the Petitioner who has made payments to Company and the Company has taken such benefit under the Transaction.

(emphasis supplied)

31. This passage must, I believe, be carefully parsed. Deutsche Bank says that:

(a) There were oral instructions from Finolex; who gave this to whom and when is not stated.

(b) These oral instructions are alleged to have specified a fixed "entry" level; why this should have been so, or what possible effect it might have had is not explained at all.

(c) The transaction was entered into only after 4:30 pm, after the Japanese Yen reached 118.55; again, there is nothing to show this.

32. Clearly, these are matters that must either be documented if the assertions are said to be affirmed on the basis of available records, or, being undocumented, must be to the personal knowledge of the person who affirmed the petition. That affirmation is by one Atulya Sharma, and, as Mr. DeVitre points out, he categorically says that he affirmed the petition on the basis of "information derived from the petitioner's records". That must necessarily mean some contemporaneous record of these critical assertions. There is none.

33. What is more puzzling is this reference to 4:30 pm as the transaction time. This is the time after which, according to Deutsche Bank, the Japanese Yen reached the entry level of 118.55 allegedly specified by Finolex. But this time of

4:30 pm IST is inexplicable. Throughout, the reference is only to 3:00 pm Tokyo time, about 11:30 am IST. At the time the Tokyo exchange opened and when, according to Deutsche Bank, the Japanese Yen crossed the barrier event mark, it would have been very early in the morning in India, well before 10:00 or 11:00 am. When, exactly, therefore the Japanese Yen hit the so-called entry-level is unknown. If it reached that level at the specified Tokyo time, 3:00 pm, that was 11:30 am IST, and the contract execution time of 4:30 pm mentioned by Deutsche Bank is meaningless and without cogent explanation. If the Japanese Yen had indeed crossed the entry-level mark, descending from its barrier-event mark at the start of the day's trading, and if that was at or before 3:00 pm Tokyo time, 11:30 am IST, then there was not only no reason to wait till 4:30 pm, but there is also no explanation for this, nor an explanation as to how the Yen could have crossed the entry-level mark at 4:30 pm IST (about 8:00 pm Tokyo time), given that the transaction is linked to a Tokyo-based reporting index and the spot rate for every Fixing Date is pegged to 3:00 pm Tokyo time. There is, thus, an inherent contradiction in paragraph 8(aa) of the petition.

34. All of this, of course, hinges on the oral instructions Deutsche Bank claims to have received from Finolex. This is a position Deutsche Bank maintains even in subsequent correspondence (for instance, its advocates' letter dated 11th February 2011 to Finolex's advocates, Exhibit "C" to the affidavit in reply).

35. Mr. DeVitre is, I believe, correct in pointing out that there is a major dispute about a fundamental issue: is it the trade time or the trade date that is material? Clause 5(i) of the Confirmation Sheet of 24th August 2007, the Knock Out Provision, speaks of a "Fixing Date from and including the Trade Date. The Term Sheet, however, that preceded the Confirmation Sheet by several days, speaks of a termination condition "from the Trade Date." Mr. Tulzapurkar's argument that the trade date cannot include a date before the contract was executed is, of course, logical and correct, but that is posited on the assumption that there is no dispute about the time of the transaction; i.e., that both parties accept, as a matter of undisputed fact, that the contract was executed after 4:30 pm on 9th August 2007.

36. I do not think it is possible to accept Mr. Tulzapurkar's submission that this factual position is, or must be deemed to be, undisputed. He references to paragraph 11(j) of the affidavit in reply to say that there is no denial of Deutsche Bank's assertions as (i) oral instructions and (ii) the time when the contract was executed:

The Respondent has now come to know that USD/JPY had traded above 119.30 on the trade date itself and thus the 2nd deal also got knocked out on the very first day itself as the Barrier Event occurred on August 9, 2007, as the Spot Rate was greater than or equal to the knock out level. The Petitioner however, suppressed the said fact and maliciously continued to represent to the Respondent that the transaction was still on. The Respondent states that he was relying upon the Petitioner's expertise and information as to the daily movement

in USO I JPY rates. The Respondent did not have any reason to doubt the Petitioner's action in informing the Respondent about the happening of a knock-out event. This was especially so because the Petitioner itself had informed the Respondent of the knock-out of the first deal. The Petitioner not only suppressed the fact that the deal had got knocked-out on the trade date itself but further persuaded the Respondent to restructure the said deal requiring the Respondent to pay a huge sum of Rs. 6,75,34,800/- and Rs. 6,73,32,800/- on two occasions which was in law or in contract not payable by the Respondent.

37. I do not think it is possible to read any affidavit in this manner, one that appears to me to be altogether too technical and unforgiving. Regard must be had to the affidavit as a whole. There are other portions where Deutsche Bank's position in the petition has been, in my view, sufficiently controverted. The very next paragraph, 11(k) reads:

11(k) The Respondent says that it came to know about the aforesaid facts and figures when the Respondent for the first time realized that the trading rate I spot rate of Japanese Yen against the U.S. Dollar had crossed 119.30 yen to a dollar on the trade date itself. The Respondent has obtained the record available on the official website of the Bank of Japan from which it is apparent that the Japanese Yen traded over and above the knock out rate as agreed under the terms sheet dated August 9, 2007. The Respondent thus says that the transaction had got knocked out on the trade date itself and the Petitioner had illegally and fraudulently induced the Respondent from entering into two re-structured deals and had thereby fraudulently induced the Respondent to pay a sum of Rs. 13,48,67,600/- in two tranches of Rs. 6,75,34,800/and Rs. 6,73,32,800/- dated 25th March, 2008 and 14th May, 2008, respectively.

38. A portion of paragraph 4 of the affidavit in reply says:

Despite the aforesaid request by the letter dated January 20, 2011, the Advocates for the Petitioner have not fixed a mutually convenient date and time to grant inspection of the documents referred to and relied upon by the Petitioner and instead addressed letter dated 11 February, 2011 alleging oral instructions etc as evident therefrom.

39. These alleged oral instructions are disputed. Perhaps by necessary implication but nonetheless effectively the assertions as to the time of execution of the contract are denied. In any case, that averment as to the contract execution time is entirely dependent on the correctness of the averments as to oral instructions being received and being acted on. What Mr. Tulzapurkar's defence of Deutsche Bank's averments in paragraph 8(aa) of the petition amounts to is this: that because there is not a denial that meets the rigour of, say, the Code of Civil Procedure, 1908, therefore Deutsche Bank's case must be deemed to have been admitted by non-traverse. This is much too slender a thread on which to hang a claim as hefty as the one Deutsche Bank makes in this petition.

40. Mr. DeVitre also points out that there are several crucial, yet careful, elisions in this Company Petition, apparent when it is set beside Deutsche Bank's Original Application No. 160 of 2009 filed before the Debt Recovery Tribunal. Before the latter, Deutsche Bank said there were telephone discussions between Finolex and Deutsche Bank's Treasury Department in Mumbai. This is not to be found in the Company Petition. In the Original Application before the Debt Recovery Tribunal, Deutsche Bank sought leave to "refer to and rely on relevant documents" pertaining to its assertions in paragraph 18 of the Original Application. This paragraph mirrors paragraph 8(aa) in the present petition where, however, there is no such reliance. In paragraph 32 of its Original Application, Deutsche Bank claims that there was much correspondence, including in email exchanges, as also telephone conversations between representatives of Finolex and Deutsche Bank. Following a telephone conversation between persons unknown and unnamed, subsequent emails, also unspecified, recorded the terms of the transaction. It was thereafter that the confirmations were sent to Finolex, and the confirmations are said to have "in effect confirmed" the earlier emails and correspondence. Again, Deutsche Bank craves leave to refer to and rely upon "the several correspondence and emails and also telephone conversations between" Deutsche Bank and Finolex. This entire paragraph is not to be found in the present Company Petition. There are other such assertions in the Original Application as well.

41. This creates another conflict between Deutsche Bank's position in two parallel, factually similar but distinct proceedings. If, as Deutsche Bank says in the Original Application before the Debt Recovery Tribunal, there is evidentiary material of this telephone conversations and emails and, in particular, of Finolex specifying an entry point, and if the Term Sheet or Confirmation Sheet are supposed to affirm or confirm these, then one might reasonably expect to see these specifics properly reflected in the signed documentation: an endorsement, perhaps, of the specified entry level, or a confirmation that the document was not to be executed till a certain event happened. There is simply no such evidence.

42. What Deutsche Bank seeks is, I think, a mechanism by which it can altogether circumvent the discharge of its probative burden before the Debt Recovery Tribunal. There, given its pleadings, it will need to prove all its many averments and statements and disclose the documents on which it has placed reliance. Here, in the Company Petition, it excludes all mention of these particulars -not just "oral instructions" but telephone conversations and emails - and seeks, instead, to rely only on a forensic argument as to the quality of the pleadings. The consequences are grave. If Deutsche Bank fails to establish two crucial facts, viz., that the contract was entered into at 4:30 pm, and that Finolex orally (either in meetings or over the telephone) refused to enter the play till the Japanese Yen struck a particular mark, then it might fail altogether; and then there would be no liability on Finolex's part. In addition, Deutsche Bank must establish the movement of the Japanese Yen on the day in question and match it

to a time sequence, for it has pinned itself to very definite time frames. In Finolex's civil suit demanding a refund and more, too, these are among the many questions that must be addressed. Assuming for a moment that every one of Mr. DeVitre's other submissions are rejected in every forum, he may still well succeed only on this aspect of the matter; and this is an aspect that, quite clearly, does not lend itself to any sort of summary assessment. It must be decided only after evidence is taken. Indeed, that is the only manner in which it can ever be decided. To hold in favour of Deutsche Bank would be to leapfrog over the many hurdles in its path in actually proving its case and discharging its evidentiary burden. That I cannot permit.

43. Let me also assume for the moment that Mr. DeVitre's submissions as to the legality of the transaction, its alleged nonconformity with the RBI Master Circular, and of its being a wagering contract are to be decided against him; and, too, none of these questions are *res integra*, having been decided in a welter of cases: Rajshree Sugars (Supra) and Emcure Pharmaceuticals (Supra) among others. The decision of the Supreme Court in Kotak Mahindra Bank Ltd. Vs. Hindustan National Glass and Ind. Ltd. and Others, is also worth noting, if only in passing: for here, the Supreme Court decided a batch of cases, including a civil appeal by Emcure Pharmaceuticals against ICICI Bank and another civil appeal by Finolex against Deutsche Bank, both against decisions of this Court in writ petitions relating to wilful defaulter proceedings. The Supreme Court held that even liabilities under derivative transactions are covered by the RBI Master Circular/s on wilful defaulters. Thus, even assuming that this argument -- that the wilful defaulter proceedings lie outside the RBI Master Circulars -- is answered against Mr. DeVitre, he can still distinguish this case on certain facts that, as I have noticed, lie at the heart of the dispute. At what time precisely on 9th August 2007 did the parties enter into the contract? What was the rate of the Japanese Yen to the US Dollar at that time? How did the Japanese Yen move against the US Dollar through that day? When did it strike the so-called entry level of ? 118.55? Who at Finolex informed whom at Deutsche Bank to wait for the USD/JPY rate to reach this level, and when? What reason was given for this request? What could be the possible explanation? Why is this very specific instruction not noted in the term sheet or the confirmation sheet? At the very least, it ought to have been noted on the former, for that was executed on 9th August 2007 itself. When was the time of 4:30 pm fixed for execution and by whom, given that it was, presumably, possible to enter into this transaction at any time after 11:30 am (3:00 pm Tokyo time), the relevant contractually specified time?

44. None of these questions can be answered in this petition. Every one of them demands evidence. These questions on their own cannot be said to be an insubstantial defence or a dispute, nor one that is purely sham, illusory or speculative. The Company Court cannot hold a trial. It can only decide whether there are grounds of substance. These cannot, of course, be some devious or ingenious mask, nor a mere wrangle. In the words of the Supreme Court in IBA

Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., :

It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt ... if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability u/s 433(e) read with Section 434(1) (a) of the Companies Act, 1956.

45. That Mr. DeVitre's formulation of Finolex's defence cannot possibly be said to be spurious or specious is, I think, reinforced by the quite different stand Deutsche Bank takes in its Original Application; and by its lack of any adequately fleshed out particulars of the evidence-dependent matters it asserts in relation to the events of 9th August 2007. There is little doubt in my mind that Deutsche Bank cannot expect to succeed on the petition as it is laid. There are seriously disputed questions of fact that go to the root of the matter. These cannot be glossed over. Nor can they be brushed aside or wished away on the basis of a non-traverse, assuming there is such a non-traverse. The petition's own averments raise questions that demand the taking of evidence. The defence lacks neither substance nor bona fides, and it is far from chimerical.

46. There is also the fact that Finolex's financial position is far from weak, as I have noted. It is true that, absent a valid, bona fide and plausible defence to a petitioning-creditor's claim, it is no answer to point to a company's sound financial position. But where there is a defence of some substance, one that cannot be dismissed out of hand, these are factors that must weigh with a court of equity. They cannot be ignored altogether, as Mr. Tulzapurkar would have me do. Where, independently of a reference to a company's finances, it is found that there is a genuine dispute, and where the defence is not merely that the company is able to pay, the commercial solvency of the company is certainly a material circumstance to be considered.

47. I must, in conclusion, return to this Court's decision in Viral Filaments. There is no equivalence between a proceeding in the Debt Recovery Tribunal under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and a winding up petition under Sections 433 and 434 of the Companies Act, 1956. This does not and cannot mean that a company court, in exercise of its equitable jurisdiction, must, only because of the pendency of a proceeding in the other forum, proceed on the a priori assumption that the debt claimed is undisputed. Viral Filaments relies on the Supreme Court decision in Haryana Telecom Ltd. Vs.

Sterlite Industries (India) Ltd., :

The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the Company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a Company is contained under the Companies Act and is conferred on the Court.

The position is no different if the claim is not on the basis of the just and equitable clause but on the rebuttable presumption that the company is unable to pay its debts because it has refused or failed to pay a claim that the petitioning-creditor says is undisputed. The company court must assess whether the defence to the claim lies within the parameters enunciated by a long line of cases and culminating in IBA Health, irrespective of whether or not there is a pending adjudication as to the debt itself before the Debt Recovery Tribunal. Once, therefore, it is found that there is a substantial defence, one that requires investigation and not one that can be said to be without merit, the winding up petition must fail, and it makes no difference that the petitioning-creditor has a pending application before the Debt Recovery Tribunal.

For these reasons, the Company Petition is dismissed. There will be no order as to costs. The two company applications, one by Finolex for inspection and the other by Deutsche Bank for interim relief, do not survive and are, accordingly, disposed of as infructuous.

1 Company Petition No. 431 of 2010, decided on 9th December 2011, per S.C. Dharmadhikari, J.

2 "Fraud" in the sense of the client or constituent having been deceived or lured by the bank into entering into a one-sided transaction weighted against the client.