(1998) 09 BOM CK 0088

In the Bombay High Court

Case No : Company Petition No. 715 of 1997

Deutsche Bank AG APPELLANT

Vs

Sunmick Exports (P.) Ltd. RESPONDENT

Date of Decision : 04-09-1998

Acts Referred:
Companies Act, 1956 — Section 433, 434
Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : (2001) 105 CompCas 152

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : D.D. Madon, instructed by Kanga and Co, for the Appellant; P.N. Mody, instructed by Hariani and Co., for the Respondent

Final Decision : Allowed

Judgement

F.I. Rebello, J.—The petitioners have filed this winding up petition against the company alleging that the cheque in an amount of Rs. 3,37,65,064, dated March 29, 1997, when presented for payment to the bank was dishonoured on account of insufficient funds. It is the case of the petitioners that they had given what is known as a packing credit facility to the company in order to meet certain export orders received by the company. Though a statutory notice was served on the company u/s 434 of the Companies Act, 1956, no reply was sent and consequently the present company petition.

2. An affidavit has been filed on behalf of the company by one Mr. Dattatraya Sondekar. In paragraph 3(b) of the affidavit, it has been alleged that in terms of the agreement of understanding between the petitioners and the company, the petitioners were fully secured before, during and after the export by hypothecation of goods and other securities as set out therein. This included a direct assignment of the monies payable by Neptune General Trading, the foreign party, by drawing a bill of exchange directly in favour of the petitioners and the same being accepted by Neptune General Trading thereby discharging the

respondent-company of any initial liability. It is alleged that without any cause or reason, Neptune General Trading had delayed payment though never denying their liability. It is also alleged that the company has to recover and receive large sums of money from various other debtors also. It is alleged that the company is a financially sound company. It is alleged that before granting the packing credit facility, the petitioners had verified the purchase orders and the bona fides and worthiness of Neptune General Trading and after due verification had advanced the sums to the company. It is further contended that in terms of the arrangement the petitioners had received money from Neptune General Trading. An additional affidavit has been filed on behalf of the petitioners. In that, the petitioners have pointed out that they had purchased six export related bills of exchange under the export packing credit facility granted to the respondent-company. It is pointed out that they have received one amount on April 16, 1996, in respect of which they have given credit to the company. It is further pointed out that after the filing of the petition, they have received on November 6, 1997, another payment for which also they will give credit to the company.

3. At the hearing of the petition, on behalf of the petitioners it is contended that the company had in respect of the amount advanced, issued to the petitioners, the cheque dated March 29, 1997, which was dishonoured by forwarding letter of March 27, 1997. The bills of exchange which are purchased, it is pointed out, are much earlier to the issuance of the cheque. On behalf of the company it is contended that it is true that the company availed of the packing credit facility. It is further pointed out that there was a novation of the contract inasmuch as the petitioners after having purchased the bills were directly to deal with Neptune General Trading. Attention is invited to instructions given by the petitioners to their bankers abroad to remit the money received in favour of the petitioners'' account in New York. In the light of that it is contended that there is no amount due and payable by the company to the petitioners. It is further contended that the cheque was given and was not to be encashed. In support of this contention learned counsel for the company has invited my attention to the various provisions of the Negotiable Instruments Act, 1881, more specifically Sections 31, 34, 64, 134 and 135.

4. On a consideration of the averments in the petition and the reply filed by the company, the arguments canvassed on behalf of the company based on the bills of exchange cannot be prima facie accepted. The petition was filed on the basis that a packing credit facility was given to the company. The immediate cause for filing the petition was dishonour of the cheque dated March 29, 1997. In the affidavit in reply the company has nowhere pleaded novation of contract. On the contrary it has been contended that various securities are given. No plea that the liability of the company has been discharged by purchase of the bills of exchange has been pleaded by the company in their reply. The mere fact that the petitioners had directed the bankers abroad to remit the money to New York if received cannot be said to be a contract entered into between the parties. A contract would be said to be concluded between the parties if expressly or by

conduct the petitioners had agreed to the arrangement which according to the company was arrived at by purchasing the bills of exchange. Apart from the fact that there are no pleadings, there is also no acceptance of the said proposal, nor by conduct can it be said that a new contract came into existence. On the contrary the company by their letter of March 27, 1997, forwarded a cheque in the amount of Rs. 3,37,65,064 to the petitioners. This must destroy the contention of the company that there was a novation of contract. Section 118 of the Negotiable Instruments Act is the section pertaining to presumptions. One of the presumptions is that every negotiable instrument was made or drawn for consideration and that every such instrument where it has been accepted, endorsed, negotiated or transferred was accepted, endorsed, negotiated or transferred for consideration. Apart from that by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, Parliament had amended the Act introducing Chapter XVII. Section 139 of the Act reads as under :

"Presumption in favour of holder.--It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."

5. Section 138 provides that where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque.

6. Thus a conjoint reading of sections 138 and 139 would show that there is a presumption that the holder of the cheque received the cheque of the nature referred to in Section 138 for the discharge in whole or in part of any debt. No doubt Section 138 makes such dishonour a criminal offence in such an event. However, what is clear is the presumption that the person who issued the cheque is liable for the amount due and payable unless the presumption is rebutted. It could perhaps be argued that this presumption is limited to a criminal offence and can only be rebutted before the court when the criminal proceedings are initiated. At any rate it has the same effect as Section 118 of the Act. In the instant case, it is pointed out that in the affidavit filed by the company the only explanation given is that the cheque was not to be presented. The explanation cannot be accepted as the cheque was forwarded by letter dated March 27, 1997. No such explanation was set out in the said letter or for that matter any other contention.

7. It is also contended on behalf of the company that no notice of dishonour was

given by the petitioner to the company. It is also pointed out that even in terms of Section 106 in the case of a notice of dishonour, such notice must be given within reasonable time. For the purpose counsel has relied on the Division Bench judgment of the Lahore High Court in the case of Bahadur Chand-Prabh Dial v. Gulab Rai-Nanak Chand, AIR 1929 Lah 577 ; in the case of F. Nanak Chand Ramkishan Das and Others Vs. Lal Chand Ganeshi Lal and Others, . Reliance has also been placed on the judgment of the apex court in the case of Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd. [1972] 42 CompCas 125 for the propositions that if the company had raised bona fide dispute the petition ought to be rejected.

8. The contention in respect of the bills of exchange is not being considered as this defence was not pleaded in the affidavit. What was pleaded is as pointed out in paragraph 3(b) that the amount was secured by the various instruments as set out in para. 3{b). Even otherwise as explained earlier on account of the subsequent issue of the cheque the said argument has no substance. In so far as bona fide dispute is concerned, the reply does not disclose any bona fide dispute.

9. I am, therefore, satisfied that the company is indebted to the petitioners for the amount of the dishonoured cheque. In the light of that the following order :

Petition is admitted and made returnable on January 22, 1999. To be advertised in Free Press Journal, Janmabhomi and Maharashtra Government Gazette. Petitioners to deposit Rs. 1,000 with the Prothonotary and Senior Master within four weeks.

10. There is also a prayer for appointment of a liquidator. I, however, do not propose to deal with the same in this petition. Liberty to the petitioners to apply.

11. Counsel for the respondent-company seeks stay of the order for a period of six weeks. Stay subject to the condition that the company files an undertaking that they will not move the BIFR under the Sick Industrial Companies Act, 1985, within a course of the week. Petitioners not to take steps to advertise the petition on or before October 31, 1998.

