

(2012) 11 BOM CK 0083

In the Bombay High Court

Case No : Company Petition No. 221 of 2012 and Company Application No. 304 of 2012 in Company Petition No. 221 of 2012

Deutsche Bank AG, London

APPELLANT

Vs

Pearl Engineering Polymers Limited

RESPONDENT

Date of Decision : 19-11-2012

Acts Referred:

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

Citation : (2013) 2 ALLMR 188 : (2013) 117 SCL 45

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Virag Tulzapurkar, assisted with Dr. Birendra Saraf, Mr. Sachin Chandarana, Mr. Shiraz Fatakia, instructed by M/s. Manilal Kher Ambalal and Co., for the Appellant; Arun Khosla, a/w. Mr. Prakash Punjabi instructed by y M/s. Prakash Punjabi and Co., for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—The Petitioner, a Foreign Company, constituted under the laws of Germany, has invoked Section 433(e) and 434 of the Companies Act, 1956, (for short "the Act"). The Petitioner has been authorized to carry on banking business in India. The basic facts about the Petitioner-Bank and the reasons for filing of the present Company Petition for winding-up against M/s. Pearl Engineering Polymers Limited, i.e. the Respondent-Company, are as under :

The present Petitioner is a body corporate and is also authorized to carry on banking business in India and constituted under the Laws of Germany. One Asian Finance & Investment Corporation Ltd. ("AFIC") being an institution as per the laws of Republic of Singapore engaged in investment for industrial activities in the Asian Region. Under the terms of an agreement relating to sale of assets and subscription for shares dated 28th February, 2005 ("Purchase Agreement"), ACTIS AFIC Holdings Ltd. agreed to purchase certain financial and investments (including the debts owed by the Respondent Company to AFIC) from AFIC and

to subscribe to the shares of AFIC. The said Purchase Agreement was valid and conditional upon approval of the shareholders of AFIC and grant of order by the High Court of Republic of Singapore to sanction the scheme of arrangement between AFIC, its shareholders and ACTIS AFIC Holdings Ltd. The scheme became effective pursuant to the order dated 10th May, 2005 passed by the High Court of Singapore. Thus ACTIS AFIC Holdings Ltd., became entitled to all rights in respect of the Company's said loan. Thereafter, as a result of the internal arrangement between the ACTIS" group of companies under a Trust Deed dated 7th June, 2005 ("Trust Deed"), AFIC was appointed as a Trustee of ACTIS AFIC Equity Management Ltd., ACTIS AFIC Credit Management Ltd. and ACTIS AFIC Labuan Ltd. to hold in trust the assets for the aforesaid companies. Thus, AFIC as trustee of ACTIS AFIC Credit Management Ltd. came to hold the legal title to the said loan and rights thereto. It is pertinent to note that under the terms of the Trust Deed, AFIC, ACTIS AFIC Holdings Ltd. and ACTIS AFIC Credit Management Limited agreed that debts owed by the Respondent Company to AFIC shall be held by AFIC on trust for ACTIS AFIC Credit Management Limited. Thus, the transfer from ACTIS AFIC Holding Ltd. to ACTIS AFIC Credit Management Ltd. of the beneficial interest in the loan took place, with AFIC as trustee continuing to hold the legal title thereto, now as trustee for ACTIS AFIC Credit Management Ltd. Thereafter, vide Trade Confirmation dated 26th March, 2007 executed by AFIC (the Trustee appointed under the Agreement dated 7th June, 2005) and ACTIS AFIC Credit Management Ltd. as also the Petitioner, ACTIS AFIC Credit Management Ltd. with AFIC signed and recorded the terms of the sale of the loan of the Respondent Company to the Petitioner. Pursuant thereto AFIC acting on behalf as investment manager for ACTIS AFIC Credit management Ltd. assigned all its rights, title, interest, obligations, benefits arising under a Loan Agreement dated 30th July, 1993 and the Amendment Agreement dated 24th November, 2003 executed between AFIC and the Respondent Company to the present Petitioners vide Sale and Purchase Agreement dated 30th March, 2007. Thus the Petitioner became the legal and beneficial holder of all rights inclusive of the rights of recovery of the said loan in its own right.

2. The Respondent Company availed of a financial assistance including term loan from AFIC in order to establish a plant to produce 17250 TPA of specialty bottle grade polyester chips at Kurkumbh, Plot No. D-17, MIDC Industrial Area, Taluka Daund, District Pune, Maharashtra.

3. As there were constant defaults and the liability was quite huge, the Petitioner had filed a winding-up Petition (291/2010) which was withdrawn with liberty and, therefore, the present Company Petition.

4. The matter listed for admission. The Respondent Company by its affidavit-in-reply dated 10th July, 2012 resisted the same on all counts and even raised issue of locus standi of the Petitioner to maintain the present Petition. An affidavit-in-rejoinder also filed by the Petitioner.

5. The case of the Respondent is that they have paid the dues on installments till 31st December, 2005 and thereby discharged the liability of the erstwhile AFIC. There is serious dispute raised with regard to the Sale and Purchase Agreement dated 30th March, 2007, whereby AFIC and the Petitioner entered into the transaction and that resulted into filing of the Petition in May 2012, on the basis of alleged due and payable claim of US Pound 31,28,855 along with US Pound 96,950, due on 30th September, 2006. The aspect of limitation is also important.

6. There is nothing on record to show and justify that at any point of time, the Respondent Company admitted the Petitioner's ownership, entitlement and/or agreed to make the payment so claimed. These disputed facts go to the root of the matter. The earlier background, the litigation and the reasons for withdrawal, as reflected in the affidavit, are also additional factors, which unless adjudicated finally, just cannot be overlooked.

7. I have already dealt with in Company Petition No. 86 of 2012 (17-10-2012) by referring to the Supreme Court Judgment, IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., , about the effect of disputed questions and facts and the defence so raised in such matter. If it is a bona fide dispute, the Court needs to consider these aspects before passing any order or even admission of the Company Petition. The Apex Court in IBA Health (India) Private Limited (supra), while dealing with Section 433(e) and 434 of the Act, has recorded as under :

20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. 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.

34. A creditor's winding-up petition, in certain situations, implies insolvency or financial position with other creditors, banking institutions, customers and so on. Publication in the newspaper of the filing of winding-up petition may damage the creditworthiness or financial standing of the company and which may also have other economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute

insolvency much more than what it was when the petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of the public at large.

8. The issues are also with regard to the details of valid/binding assignment of debts/the Sale & Purchase Agreement in question. The aspect of Master Circular for External Commercial Borrowing dated 2nd July, 2012 issued by the Reserve Bank of India and the related Regulations and detailed reasoning to justify the entitlement of the Petitioner to file present Petition is also a matter of debate. Certain issues are even pending before the concerned Authorities in this regard between the parties referring to the details of the assignment. Therefore, it is not the question of invalidation and/or illegality of the assignment of loans, but the question is the final authority and entitlement of the Petitioner to claim the same. The Petitioner specifically averred and contended that the due and payable amount to the erstwhile AFIC was paid in the year 2005 itself. The aspect of violation of the Foreign Exchange Management Act, 1999 and FEMA Regulations, 2000, as averred and as denied is also an additional factor.

9. Let Competent Authority decide and declare finally that the Petitioner fulfills all qualifications to be the lender including the retrospectivity of the SEBI circulars, if any. We are concerned with the invocation of these provisions under the Company Act and not the action and/or proceedings under the other Acts. There is a substance in the contentions so raised by the learned Senior Counsel appearing for the Respondent that the debt has been secured by mortgaging the immovable property of the Company. There is nothing brought on record to show that they have complied with all these formalities and there is a conclusive decision with regard to the validity of the assignment, transfer and their entitlement to claim the alleged amount, as the lender from the Respondent-Company. There is even a dispute raised with regard to the intimation and/or about valid transfer of Deed of Assignment and the Sale and Purchase Agreement dated 30th March, 2007. The Respondent's RBI approval of 10th June, 2012 to the amendment in original terms and conditions following BIFR sanctioning Rehabilitation Scheme, that itself cannot be to disentitle the Respondent to challenge the ownership/title/entitlement of the Petitioner to claim such alleged due and payable amount, based upon the unregistered Deed of Assignment and the Sale and Purchase Agreement in question.

10. The Petitioner needs to stand on his own leg for claiming the benefits of the provisions in question. We cannot compare such liquidation action with the ordinary money recovery suits. The Company Judge is not competent to decide the validity and/or dispute so raised with regard to the Sale and Purchase Agreement and so also the Deed of Assignment in question, as it requires various decisions prior and even post of the transactions.

11. The Respondent Company as mentioned unable to pay after 31st December, 2005 due to liquidity constraints in view of losses, that itself cannot be the reason to accept the case of the Petitioner in the facts and circumstances of the

case. In all these prior proceedings, till the Deed of Assignment and/or sale and purchase transactions, the Petitioner Company was nowhere in picture. The Mortgage deed and the hypothecation of movables and the default clauses therein, are still there to recover the amount due, if any.

12. The documents relied and referred by both the Counsel itself shows that there are various questions, which need to be adjudicated first before accepting the averments of the Petitioner. Unless the transactions based upon which the present Petition is filed by the Petitioner has binding force and unless it is declared accordingly in view of the challenge so raised, I am inclined to observe that the present Company Petition, as filed, is not sufficient to pass the winding-up order against the Respondent-Company. There is no foundation to accept and exercise the discretion that the Respondent-Company "neglect to pay due and "payable/agreed amount". The Petitioner is not remedy less to recover the amount.

13. In view of above, I am inclined to observe that there are various disputed questions of facts are involved; and the amount so claimed cannot be stated to be admittedly due and payable apart from the entitlement of the Petitioner. Therefore, the Petition is dismissed. However, all points are kept open. No order as to costs. In view of the dismissal of the Company Petition itself, nothing survives in the Civil Application and the same is also disposed of.