

(2007) 07 DEL CK 0202
In the Delhi High Court
Case No : CP No. 144 of 2007

HDFC Bank Limited

APPELLANT

Vs

Neelam (India) Pvt. Ltd.

RESPONDENT

Date of Decision : 26-07-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6
Companies Act, 1956 — Section 433, 433(1), 434, 434(1), 439
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142

Citation : (2007) 07 DEL CK 0202

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Parag Tripathi and Kunal Tandon, for the Appellant; Nemo, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—This is a petition filed by the petitioner bank u/s 433(e), 434 and 439 of the Companies Act, 1956 for winding up M/s. Neelam India Pvt. Ltd. The plea of the petitioner is that working capital to the extent of Rs.150 lakh being an inventory finance was sanctioned to M/s. Silver Line Motors Pvt. Ltd. In order to avail the inventory finance, M/s. Silver line Motors Pvt. Ltd. submitted various documents including a letter of continuing guarantee dated 30th November, 2005 by the respondent in favor of the petitioner.

2. The petitioner has produced the letter of continuing guarantee alleged to be signed on behalf of the respondent by Neelam Sharma as Director of respondent. The letter of continuing guarantee though signed on behalf of respondent has various blanks regarding the facilities granted to the borrower in respect of which the alleged guarantee was executed; the principal amount granted to the borrower towards the said credit facilities; the Bank branch at which it was payable; the date on which it was signed. In the beginning of this letter, the date is given as 30th November, 2005, in the end of the letter of continuing guarantee

no date is given. The letter of continuing guarantee also has blanks as pursuant to which resolution of the Board the seal of the respondent company was affixed and in presence of which persons.

3. According to the petitioner, the borrower, M/s. Silver line Motors Pvt. Ltd., failed to maintain financial discipline, consequently, was declared as NPA (Non Performing Asset) on 24th January, 2005 and in accordance with the guidelines of Reserve Bank of India. It is also alleged by the petitioner bank that M/s. Silver line Motors Pvt. Ltd. agreed to pay the overdue amount and issued post-dated cheques to the bank, however, these cheques were subsequently replaced, the details of which are given in para 3 of the petition. Later on payment of these cheques was stopped by the drawer.

4. The petitioner contended that since the respondent company and M/s. Silver line Motors Pvt. Ltd. did not have any intention to repay the amounts outstanding of the cheques, complaints u/s 138 read with Section 141 and 142 of the Negotiable Instruments Act were filed against M/s. Silver line Motors Pvt. Ltd. Perusal of the copy of the complaints filed u/s 138 read with Section 141 and 142 of Negotiable Instrument Act, 1881, before the Metropolitan Magistrate at 33rd Court, Ballard Pier, Mumbai, which is at page 75 of the paper book, it is apparent that no complaint has been filed against the respondent company.

5. In the circumstances, it is apparent that neither any cheque was given by the respondent company towards repayment of alleged amount from borrower nor any of the cheques of the respondent company has been dishonoured entailing proceedings u/s 138 of Negotiable Instruments Act, 1881 against the respondent company.

6. According to the allegations of the petitioner, since M/s. Silver line Motors Pvt. Ltd. failed to pay the alleged amount of Rs.1,39,74,969.59 despite various demands made to them, petitioner bank filed a petition before Debt Recovery Tribunal which was registered as OA No.200/2006. The plea of the petitioner is that the Debt Recovery Tribunal has restrained M/s. Silver line Motors Pvt. Ltd. from disposing, alienating, and/or selling the properties owned by M/s. Silver line Motors Pvt. Ltd. A copy of the order dated 20th November, 2006 of the Debt Recovery Tribunal has also been produced whereby interim relief in terms of prayer Clauses b (i), c (i) and c (ii) had been granted against all the defendants. Perusal of the schedule of the properties annexed with the recovery petition filed before the Debt Recovery Tribunal reflects that the properties mentioned in Exh.B1, B2 are of defendant No.1 besides the immovable property at Solan shown in Exh.C and another property at Sainik Farms, New Delhi shown in Exh.D. The list of documents filed with the petition before the Debt Recovery Tribunal reflects that a letter of continuing guarantee dated 29th September, 2005 was filed whereas the copy of the letter of continuing guarantee with the present petition, annexure 5, is dated 30th November, 2005, and in the list of documents no letter of continuing guarantee by the respondent M/s. Neelam India Pvt. Limited, has been filed by the petitioner.

7. Learned senior counsel for the petitioner has contended that before the Debt Recovery Tribunal no reply has yet been filed by respondent and the matter is pending adjudication nor any order has been passed against the respondent determining his liabilities. A notice dated 22nd December, 2006 was given by the petitioner to the respondent stipulating that an amount of Rs.1,15,46,489.74 is due from M/s. Silver line Motors Pvt. Ltd. and as the respondent stood guarantor to the said transaction, Therefore, the respondent is liable to pay the amount along with interest @ 10% per annum and penal interest @ 9% from 10th October, 2006.

8. The notice of the petitioner is denied by the respondent contending specifically that the amount claimed by the petitioner is disputed and the amount as demanded by the petitioner does not constitute debt admitted by the respondent. It was also contended that sufficient assets are available with the principal borrower, namely, M/s. Silver line Motors Pvt. Ltd. and, Therefore, there is no occasion for petitioner to cast the present notice to be issued to the respondent. The respondent also objected to the admission of Rs.1,15,46,489.74 on the ground that no statement of M/s. Silver line Motors Pvt. Ltd. has been provided to the respondent and, Therefore, the respondent cannot even comment as to how this amount has been claimed by the petitioner from the respondent. The respondent has also contended that the provisions of winding up machinery is not to be used as a method of recovery and respondent is solvent and possess current assets which are more than sufficient to meet the alleged liabilities and, Therefore, it cannot be stated that the respondent is unable to pay its debt.

9. Learned Counsel for the petitioner has also relied on The Bank of Nova Scotia Vs. RPG Transmission Limited, holding that in case the remedies available to the petitioner under the Debt Recovery Tribunal Act and under the Companies Act are available, then it is for the petitioner to choose one of the remedies available to him. It was held that the claim in petition for winding up a company and for recovery under the DRT act, both the remedies pertaining to their jurisdiction are mutually exclusive of each other and there is no inconsistency between two different remedies. It was also held that it cannot be said that RDB Act covers field for winding up an insolvent company. The relevant observation of the Division Bench is as under:

30. Therefore, it cannot be said that RDB Act covers the field for winding up an insolvent company and, Therefore, the contentions of Mr. Tripathi are misconceived and are accordingly rejected. The contention that the petitioner could choose one of the remedies available in case where two or more than two remedies are available is applicable when the remedy provided for is one and the same but when two different remedies are provided for two different reliefs, in that event the plea of election of remedies is not applicable. We, Therefore, hold that the winding up Court is concerned with the issue as to whether or not a company could be declared as commercially insolvent and, Therefore, comes

within the ambit of provisions of Section 433 of the Companies Act. The Debt Recovery Tribunal does not have any jurisdiction to entertain any such application for winding up of a company whether the same is by any bank and/or other financial institution. We also hold that both the remedies and jurisdictions are mutually exclusive of each other and, Therefore, there cannot be any inconsistency between the two different remedies provided for in two different legislations. We respectfully agree with the Division Bench decisions of Bombay and Calcutta High Court referred to above. The legal issue, which arises for our consideration is answered accordingly....

10. This is not disputed that the petition u/s 433(e) read with Section 434(1)(a) of the Companies Act, 1956 is maintainable despite the pendency of the recovery proceedings initiated by the petitioner against the respondent as a guarantor before the Debt Recovery Tribunal. However, before any proceedings can be initiated for winding up the respondent the petitioner must establish that a definite sum of money is payable immediately. It is also settled that a winding up petition is not legitimate means of seeking to enforce payment of a debt which is bonafide disputed by the company and in case there are bonafide disputes, there cannot be neglect to pay within the meaning of Section 433(1)(a) of the Companies Act, 1956. The Madras High Court in Tubes India Ltd. v. Rim and Accessories (P) Ltd. (1993) 3 CLJ 322 had held that if there is a dispute as regards the payment of the same towards the principal, however, small that sum may be, a petition for winding up shall not be maintainable and the necessary forum for determination of such a dispute existing between the parties shall be the civil court or appropriate other forum.

11. The rules as regards the disposal of winding-up petition based on disputed claims are thus stated by the Apex Court in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., . The Supreme Court has held that if the debt is bona fide disputed and the defense is a substantial one, the court will not wind up the company. The principles on which the court acts are:

- (i) that the defense of the company is in good faith and one of substance;
- (ii) the defense is likely to succeed in point of law; and
- (iii) the company adduces prima facie proof of the facts on which the defense depends.

12. Generally speaking, an admission of debt should be available and/or the defense that has been adopted should appear to the Court not to be dishonest and/or a moonshine, for proceedings to continue. If there is insufficient material in favor of the petitioner, such disputes can be properly adjudicated in a regular civil suit. It is extremely helpful to draw upon the analogy of a summary suit under Order xxxvII of the Code of Civil Procedure. If the Company Court reaches the conclusion that, had it been exercising ordinary original civil jurisdiction it would have granted unconditional leave to defend, it must dismiss the winding-up petition or if there are such admissions on the basis of which a decree can be

passed in favor of the petitioner under Order 12 Rule 6 of the CPC then the petitioner can be admitted. In *Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another*, *Pradeshia Industrial and Investment Corporation of U.P. v. North India Petrochemicals Ltd. and Anr.* it was held by the Apex court that an order u/s 433(e) is discretionary and the debt claimed by the petitioner against a company whose winding up is sought must be a determined or a definite sum of money payable immediately or at a future date. It was further observed by the Apex Court that the inability referred to in the expression unable to pay its dues and Section 433(e) should be taken in commercial sense that is to say that its assets are such and its existing liabilities are such so as to reasonably ascertain that the assets would be insufficient to meet the existing liabilities.

13. For the company court to exercise its discretion for the remedy for winding up, an admission of debt should be available and/or the defense that has been put forward should appear to the court not to be dishonest and/or moonshine. In exercise of discretionary jurisdiction by this Court, it has to be seen that the debt claimed by the respondent is payable, prima facie, and the onus to a great extent is placed on the petitioner to satisfy the court prima facie. In every case for winding up which is filed before the company Court, the notice is not to be issued and the respondent company is to be asked to show that its defense is bona fide. From the facts pleaded and the documents produced by the petitioner, if it can not be inferred that the admission of debt is available, the Court can refuse to exercise its discretion.

14. The letter of continuing guarantee relied on by the petitioner is dated 30th November, 2005 which has various blanks and it does not spell as to in respect of which credit facilities the respondent had guaranteed to the principal borrower. The petitioner has failed to aver and plead as to which of the credit facilities granted to the principal borrower in respect of which the alleged letter of continuing guarantee should be construed when the letter of continuing guarantee is blank about it. Perusal of the copy of the record filed before the Debt Recovery Tribunal also reflects that alleged letter relied on for seeking winding up the respondent company does not find mention in the schedule of list of documents a copy of which is annexed at page 132 of the present petition. Though in the index filed along with the original application, the corporate guarantee dated 30th November, 2005 executed by the defendant No.4 has been referred to. In the petition, the petitioner has mainly made allegations against the principal borrower, M/s. Silver line Motors Pvt. Ltd. except that the payment of the cheques given by M/s. Silver line Motors Pvt. Ltd. has been stopped by the drawer and, Therefore, even the respondent company does not have any intention to repay the amount outstanding. The complaints for dishonoring of cheques have also been filed against the principal borrower and Directors and not against the respondent. The interim order dated 20th November, 2006 passed by the Debt Recovery Tribunal is also against the principal borrower M/s. Silver line Motors Pvt. Ltd. as is apparent from para 16 of the petition. The

statutory notice given to the respondent also demands Rs.1,15,46,489.74 without giving any details as to in which account this amount is due and how the respondent has admitted its liability. Merely on the basis of alleged letter of continuing guarantee, it cannot be inferred that an amount of Rs.1,15,46,489.74 has been admitted by the respondent even though this may reflect, in case such a letter of continuing guarantee which has various blanks can be relied on, that the respondent has a liability. As to how much is the liability of the respondent the amount claimed by the petitioner cannot be fastened on the respondent company without adjudication. If the liability of respondent is not settled, the petitioner cannot allege that the respondent has failed to pay its debt. The reply to notice was given by the respondent seeking the statement of borrower's accounts as maintained by the petitioner bank, however, no such account has been provided by the petitioner bank to the respondent. Learned Counsel for the petitioner was unable to disclose whether the reply to the communication dated 19th March, 2007 of the respondent was even sent. In the circumstances, it is not possible to infer that the alleged liability of the respondent of Rs.1,15,46,489.74 is acknowledged and admitted and the respondent has failed to pay the same and it should be deemed that the respondent company is unable to pay its debts and should be wound up in the present facts and circumstances of the case. I do not find any merit in the case of the petitioner so as to exercise this jurisdiction to wind up the respondent company.

15. The petition for the winding up of the respondent company is without any merit and it is dismissed.