
(2013) 12 DEL CK 0163

In the Delhi High Court

Case No : CO. Petition No. 63 of 2013 and Co. Application No's. 191-192 of 2013, 1049 of 2013, 1779 of 2013, 1785 of 2013 and Report No. 696 of 2013

HDFC Bank Ltd.

APPELLANT

Vs

Prem Power Construction P. Ltd.

RESPONDENT

Date of Decision : 06-12-2013

Acts Referred:

Citation : (2014) 1 AD 284 : (2014) 206 DLT 569

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Kunal Tandon and Ms. Nidhi Jain, for the Appellant; Saurabh Kirpal, A.P. Singh and Mr. Shyam Kumar, Advocates, Mr. Rupesh Goyal and proxy counsel for Mr. Ashish Makhija, Advocate for Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.

CA No. 2126 of 2013 (filed by the Respondent u/O 9 Companies Rules r/W Order XXXIX Rule 4 CPC)

1. This is an application filed by the Respondent, Prem Power Construction Private Limited ("PPCL"), under Rule 9 of the Companies (Court) Rules ("Company Rules"), read with Order XXXIX Rule 4 of the CPC and Section 151 of CPC for, inter alia, setting aside the ex parte interim order dated 15th February 2013 and the order dated 1st May 2013 passed by the Court. The background to this application is that HDFC Bank Limited ("HDFC") filed the above petition seeking the winding up of PPCL u/s 433(1)(e) of the Companies Act, 1956 ("CA"). When the petition was first listed on 5th February 2013, the Court enquired whether HDFC, which is admittedly a secured creditor of PPCL, was interested in pursuing the petition. Learned counsel for HDFC sought a short adjournment. On 15th February 2013, the Court was informed by learned

counsel for HDFC that it did not have any charge on any of the immovable properties of PPCL in respect of the loan advanced to it. Notice was then directed to be issued to PPCL with a direction to its Managing Director ("MD") to file an affidavit within four weeks of the service of notice setting out the details of all the movable and immovable assets of PPCL and enclosing its balance sheets, profit and loss accounts and statements of all its bank accounts for the last three years. An interim order was also passed restraining PPCL from creating any charge, alienating, transferring or parting with possession of any of its immovable assets.

2. On 1st May 2013 the affidavit of service of notice on PPCL filed by HDFC was taken note of. Since none appeared for PPCL, the Court proceeded to appoint the Official Liquidator ("OL") as the Provisional Liquidator ("PL") to take over all the assets, books of accounts and records of PPCL. The petition was directed to be listed next on 18th July 2013. It is stated that pursuant to the above order, the OL took over the assets, books of accounts and records of PPCL.

3. PPCL filed Company Application No. 1049 of 2013 seeking vacation/modification of the order dated 1st May 2013. Notice was directed to be issued in this application on 17th June 2013. In the meanwhile, PPCL filed Company Appeal No. 37 of 2013 against the order dated 1st May 2013. On 11th September 2013, the said appeal was disposed of by the Division Bench ("DB") by the following order:

At the very outset it has been suggested by Mr. Saurav Kirpal, learned counsel for the Appellant that since the impugned order dated May 01, 2013 was passed ex parte, the matter be remanded back to the learned Company Judge for hearing the Appellant. The prayer is not opposed by learned counsel for the Respondent subject to the condition that status quo is maintained in respect of the assets of the company which are stated to have been taken over by the Official Liquidator.

Learned counsel for the Official Liquidator confirms that the assets of the company have been taken over by the Official Liquidator and that Status report in this regard has been placed before the learned Company Judge.

In view of the aforesaid the matter is remanded back to the learned Company Judge for hearing afresh. Status quo shall be maintained in respect of the assets of the Appellant Company pending the hearing of the matter.

Liberty is granted to the Respondent to move an appropriate application before the learned Company Judge for amendment of the petition, as prayed.

A copy of this order be given dasti to counsel for the parties.

4. Pursuant to the above order, PPCL filed the present application with the prayers as earlier noticed. Mr. Saurabh Kirpal, learned counsel for PPCL submits that prior to the filing of the petition for winding up, no statutory notice was served on PPCL at its registered office in terms of Section 434(1)(a) of the CA.

He pointed out that before the DB, in its reply to Company Appeal No. 37 of 2013, HDFC admitted to this fact. He further stated that HDFC had already approached the Debts Recovery Tribunal (DRT), Chandigarh in October 2010 for recovery of the amounts claimed from PPCL. The said proceedings are pending. Therefore, there was no occasion for the Court to entertain the present winding up petition.

5. Mr. Kirpal submitted that the present winding up petition was based only on the ground of deemed inability of PPCL to pay its debts in terms of Section 434(1) (a) of the CA. Mr. Kirpal pointed out that despite the leave granted by the DB, HDFC had not yet amended the petition to bring it u/s 434(1)(c) of the CA. Therefore, it was not open now to HDFC to seek winding up in terms of Section 434(1)(c) of the CA.

6. Mr. Kunal Tandon, learned counsel for HDFC, first submitted that notices were sent to the registered office of PPCL at Khasra No. 261/1, Village Ghitorni, New Delhi 110030 by courier and speed post. While the notice sent by courier was returned unserved, the notice sent by speed post was not. According to him, u/s 434(1)(a) read with Section 51 of the CA and Section 27 of the General Clauses Act, 1897 the notice sent by speed post should be deemed to have been served at the registered office of PPCL. Relying on the decisions of this Court in *Kotak Mahindra Bank Ltd. Vs. Hermonite Associates Ltd. and Another*, and *M/s. Global Infosystem Ltd. Vs. M/s. Lunar Finance Ltd.*, Mr. Tandon urged that as long as the notice was sent to the last known address of PPCL's registered office, there would be a deemed service even if the cover was returned unserved. As regards the liberty granted to HDFC by the DB to amend the petition, Mr. Tandon submits that with PPCL having failed to comply with the order dated 15th February 2013 by which it was required to furnish the latest balance sheets, profit and loss accounts and copies of the statements of all the bank accounts for the last three years, it was not possible for HDFC to plead precise averments regarding inability of PPCL to repay its debts. Mr. Tandon points out that this was the reason why HDFC filed Company Application NO. 1785 of 2013 for a direction to PPCL to comply with the order dated 15th February 2013 and Company Application No. 1779 of 2013 for taking on record a copy of the balance sheet dated 31st March 2010 along with certain additional documents. He submitted that it was only after the above details were furnished that HDFC could amend the petition.

7. The petition filed by HDFC is only with reference to Section 434(1)(a) of the CA. In other words the case of HDFC is based on the fact that despite service of the notice for winding up, PPCL did not reply or repay the debt and therefore, there is deemed inability of PPCL to repay its debts. The precise pleading as contained in paras 22 and 23 of the petition reads as under:

22. That claiming the aforementioned amount, the Petitioner sent a winding up notice dated 1st October 2012 to the Respondent at the registered office of the Respondent (as per Petitioner's records) at Khasra No. 261/1, Village Ghitorni, New Delhi-110030. Copy of the said winding up notice dated 1st October 2012 is

annexed herewith and marked an Annexure P-21. It is stated that no reply to the said winding up notice has been served on the Petitioner by the Respondent.

23. That the Petitioner also sent a winding up notice dated 11th December 2012 at the registered office of the Respondent (as mentioned on the website www.mca.gov.in) and again no reply was received by the Petitioner despite the expiry of 21 days. A copy of the notice dated 11th December 2012 is annexed herewith and marked as Annexure P-22. Therefore, the Petitioner is compelled to file the present petition.

8. This has to be read along with para 2 of the reply on merits by HDFC to Company Appeal No. 37 of 2013 before the DB which reads as under:

2. As regards service of winding up notices, it is submitted that the Respondent issued a winding up notice dated 1st October 2012 at the registered office of the Appellant, i.e., Khasra No. 261/1, Village Ghitorni, New Delhi-110030. The said notice returned with the remark "insufficient address" though the address was correctly and completely mentioned. It is a settled law that there is a presumption of service of a statutory notice where the same is sent by registered post containing complete address/particulars. The said notice is deemed to be served if the particulars provided are correct and complete. In such a case the onus of proof lies on the person alleging that the said notice was not served upon him/her.

9. Further, in para 3 of the above reply, HDFC stated:

3. It is further submitted that as per the ROC records, the registered office of the Appellant is mentioned as B-1/2065, Vasant Kunj, New Delhi-110070. Therefore, another winding up notice was sent at the aforesaid address on 11th December 2012 enclosing therewith the previous winding up notice dated 1st October 2012. The said notice returned with the remark "Addressee left without address." The returned envelopes are annexed herewith and marked as ANNEXURE A (Colly). It is pertinent to mention that the notices were also sent at the address 90-B, Phase IV, Udyog Vihar, Gurgaon-122015 which have been delivered. The proof of service is annexed herewith and marked as ANNEXURE B. The said address is the same at which the Appellant has been served in the OA filed before the DRT Chandigarh as well as admittedly in use as office as per the appeal.

10. Mr. Tandon produced the original of the envelope sent to PPCL by courier at its registered office. It was obviously unserved since it has been produced in Court. It contains the address of the registered office of PPCL as indicated in several documents. However, it did not contain the remarks "insufficient address". Mr. Tandon sought to explain that the said remarks may have been smudged. However, the fact remains that neither in the winding up petition nor in the reply filed to the appeal of PPCL, HDFC mentioned the fact that there were several notices sent to the registered office of the Respondent, both by speed post and by courier or that while the notice sent by courier was returned unserved, the one sent by speed post was not. At this stage Mr. Tandon referred

to the documents placed on record by HDFC to show that the notices were in fact sent by speed post to the registered office of PPCL. In the absence of any pleading in that regard, it is not possible to infer a deemed service of notice on PPCL on that basis.

11. The provisions prescribing the procedure for winding up of a company have to be strictly construed, since it is indeed an extreme measure that brings the activities of a company to a complete halt. It is a remedy of last resort when other methods of recovery are not feasible or are ineffective. There is a deeming fiction of inability of the company to repay its debts if it is shown that despite service of notice the company has not responded or repaid the debt.

12. In *Kotak Mahindra Bank Limited v. Hermonite Associates Limited* it was held that even where the notice sent to the registered office of the Respondent was returned with the remarks "closed office" or "left without address" there should be a presumption of service since the statutory requirement was that service had to be effected at the registered office. It was concluded that "if the registered office is closed/locked and no one is there to receive letters/notices, fault is that of the company. They cannot take advantage of their fault." However, in the present case the returned envelope that has been produced in Court is without the remarks "insufficient address" as has been pleaded by HDFC in its reply to the appeal filed by PPCL before the DB. In *Global Infosystem Limited v. Lunar Finance Limited* the notice was returned "unclaimed". That decision too, therefore, is distinguishable on facts.

13. In the instant case there is no pleading that the notice was sent at the registered office of PPCL by speed post and was not returned unserved and that, therefore, it should be deemed to have been served on PPCL. Consequently, it is not possible for the Court to proceed on that basis and conclude that the company should be deemed to be unable to repay its debts. It cannot be said that the requirement of Section 434(1)(a) of the CA has been satisfied in the present case.

14. Mr. Tandon prayed that he may be permitted to place on record the tracking report of the courier agency. There was sufficient time for HDFC to have done so considering that the DB's order was passed more than two months ago. Further, there was sufficient time for HDFC to have filed an application to amend the petition on the basis of the information available in the balance sheet of PPCL as on 31st March 2010 and reserve its rights to add further averments on the basis of the information it could have sought from PPCL through the Court.

15. For the above reasons the Court concludes that HDFC has not been able to make out a case for proceeding against PPCL u/s 434(1)(a) of the CA. The orders dated 15th February 2013 and 1st May 2013 are recalled. CA No. 2126 of 2013 is accordingly allowed.

16. Company Petition No. 63 of 2013 is dismissed. The other pending applications are dismissed, reserving the right of HDFC to seek appropriate

remedies after complying with the statutory requirements. Report No. 696 of 2013, filed by the OL, is taken on record. However, no further orders are required to be passed therein, and it is disposed of as such.

17. The OL is directed to restore the possession of the premises, assets and records taken over by him to PPCL through its Managing Director within one week. The expenses incurred by the OL are quantified at Rs. 50,000 which will be paid by HDFC to the OL within four weeks from today. Order be given dasti to learned counsel for the parties.