

(2014) 06 CAL CK 0023
In the Calcutta High Court
Case No : C.P. No. 845 of 2013

Hongkong and Shanghai Banking Corporation Ltd.	APPELLANT
Vs	
Jeevan Diesels and Electricals Ltd.	RESPONDENT

Date of Decision : 19-06-2014

Acts Referred:

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

Citation : (2015) 188 CompCas 448

Hon'ble Judges : N. Patherya, J

Bench : Single Bench

Advocate : Meena Venugopal and Sanjib Dawn, Advocates for the Appellant;
P.B. Bhaumik and S.K. Samanta, Advocates for the Respondent

Judgement

Patherya, J.—In this winding up application the claim arises on account of credit facilities given by the petitioning-creditor to the company. The case of the petitioning-creditor is that credit facility was availed of by the company in the year 2008 which facility stood amended from time to time and the last amendment was in 2010. Against the said credit given security was furnished. The petitioning-creditor has a pari passu charge with other creditors of the company, in all the properties. Part payments have been received and after giving credit for such part payment a sum of Rs. 7,00,29,142 is due and owing from the company to the petitioning-creditor. In August, 2011 a memorandum of understanding was executed between the petitioning-creditor and the company whereby the company agreed to make payment as set out in the said memorandum of understanding. It is only after the said memorandum of understanding part payments were made. Last payment was made in November, 2012 and thereafter, no payments were made. This, therefore, evidences the inability of the company to pay its debts. Accordingly/for such non-payment a statutory notice was issued under section 433(e) of the Companies Act, 1956, which though received by the company no reply has been given thereto. The letter of September 30, 2013, is written after receipt of the statutory notice which is not a reply in respect thereof. Therefore, the company petition be

admitted for a sum of Rs. 8,37,45,951 which is inclusive of interest.

2. Counsel for the company in opposing the said application submits that the statutory notice has not been issued under section 434(1)(a) of the 1956 Act therefore will not entitle the petitioning-creditor to any order on this application. Being a secured creditor the petitioning-creditor is entitled to sell the security given to it and realise the sum from sale of the securities, therefore no order can be passed on this application. The person who has signed the petition is not authorised to do so as certificate from the Notary Public is not appended to the deed of appointment of substitute attorney. As the very authority of the person who has filed this petition is under challenge which is no authorisation in law, this application be dismissed.

3. Having considered the submissions of the parties, section 433 contemplates the circumstance in which a company may be wound up by the court. Clause (e) makes it clear that one of the grounds for winding up of the company is inability of the company to pay its debts. Credit facilities had been availed by the company from the petitioning-creditor and although a memorandum of understanding was signed between the parties in August, 2011 that is much after the time had expired for the company to make payment to the petitioning-creditor pursuant to such memorandum of understanding. Part payments were made. After giving credit for such part payment made, a sum of Rs. 7,00,29,142 is due and payable by the company to the petitioning-creditor on account of principal. The petitioning-creditor has sought for a higher amount including interest thereon. But the principal is as mentioned above. Undoubtedly, no payment has been made after November, 2012 by the company to the petitioning-creditor. Securities have been given by the company to the petitioning-creditor but the securities are held *pari passu* with other charge holders either as first charge holder or second charge holder. Therefore, no security is held by the petitioning-creditor exclusively. Therefore, even if the petitioning-creditor is directed to sell its securities as canvassed by counsel for the company the petitioning-creditor would not be able to sell its securities without the consent of the other charge holders. All that the petitioning-creditor seeks is admission of its claim as there is no dispute in respect of sums payable by the company to the petitioning-creditor On account of principal.

4. For the said reasons, therefore, C.P. No. 845 of 2013 is admitted for the sum of Rs. 7,00,29,142. An opportunity is given to the company to make payment of the said sum in twelve equal monthly installments along with interest at 8 per cent per annum on and from the date of issuance of the statutory notice till realisation. In default of payment of any one installment, the petitioning-creditor will be at liberty to advertise once in Times of India and once in Ei Samay. Matter is made returnable 12 weeks hence.

5. Although the company has taken a point of the petition being verified by an unauthorised person the said cannot be accepted as the substitute attorney has been appointed by the General Power of Attorney-holder and the deed of

appointment of substitute attorney has been executed before the Notary. This in itself would evidence the authenticity of the execution of the deed of appointment of substitute attorney and a separate and independent certificate from the Notary would not be required. Although the application has been filed under section 434(1)(a) but the application has not been filed under the abovementioned section alone. It has also been filed under section 433(e) of the 1956 Act which is the section under which the statutory notice dated. September 24, 2013, has been issued. Urgent certified photocopy of this order be supplied to the parties, if applied for, upon compliance of all requisite formalities.