
(2010) 10 BOM CK 0160

In the Bombay High Court

Case No : Appeal (L) No. 559 of 2010 in Company Petition No. 189 of 2008

Horizon Flora India Limited

APPELLANT

Vs

Assets Reconstruction Co. India Ltd.

RESPONDENT

Date of Decision : 27-10-2010

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 2

Citation : (2010) 160 CompCas 370 : (2011) 1 CompLJ 140 : (2011) 2 MhLj 459 : (2011) 105 SCL 20

Hon'ble Judges : P.B. Majmudar, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Yogesh Mehta, instructed by Sachin S. Punde, for the Appellant; D.D. Madon Vinod Kothari and Sahil Saiyed, instructed by Apex Law Partners, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Majmudar, J.—This appeal is directed against the order of the learned single Judge dated 16th July, 2010 in Company Petition No. 189 of 2008 by which the Company in question is ordered to be wound up.

2. The learned Counsel for the appellant vehemently submitted that since the original petitioner, Asset Reconstruction Company (India) Ltd. (ARCIL) is an assignee of the debt, Company Petition at the instance of ARCIL for winding up is not maintainable. It is further submitted that ARCIL has been assigned the debt by the Dena Bank. The Bank also instituted proceedings before the Debts Recovery Tribunal (DRT). He submits that since the proceedings are pending before the DRT, winding up petition is not maintainable. He further submits that even otherwise the assignment in favour of ARCIL is not a valid assignment under the SARFAESI Act as ARCIL is also a sole trustee.

3. Mr. Madon, learned senior counsel appearing for the respondent, on the other hand, submitted that the company is totally insolvent for which he has relied

upon the report of the Chartered Accountant. In view of the said report, he submits that the Company is required to be wound up under the provisions of the Companies Act. So far as the point regarding ARCIL being a sole trustee and whether it has right to proceed under the Act is concerned, a Division Bench of this Court in Writ Petition No. 1268 of 2010 Alpha and Omega Diagnostics India Ltd. v. Asset Reconstruction Company (I) Ltd. and Ors. dated 9th August, 2010 has decided the said point and it has been observed in paragraph 30 of the said judgment thus:

30. In the view that we have taken and finding that the law laid down in Krishna Filaments cannot be said to be any longer valid and good in the light of the statutory provisions that the further issue, about correctness of the conclusions recorded by Division Bench in paras 25 and 26 and the interpretation placed on the definition of the word "debt" need to be considered. Now, the Bank or financial institution as an assignee can proceed under the Securitization Act, so also under the RDB Act. The term "debt" as appearing in Section 2(g) would have to be considered in the light of the broad interpretation that we have placed on the provisions of the Securitisation Act. The distinction that is drawn by Mr. Samdani is no longer valid. Even if the bank or financial institution is acting as a Trustee as suggested, it can take recourse to the RDB Act. This is clear from a reading of the definition of the term "secured creditor" as defined in Section 2(zd) of the Securitization Act. That term includes debenture trustee appointed by the Bank or financial institution or securitisation company or reconstruction company, where acting as such or managing a trust set up by such securitization company or reconstruction company for securitisation or reconstruction company as the case may be or any other trustee as contemplated by Section 2(zd)(ii). The term security interest is defined in Section 2(zj) of the Securitization Act and it means right, title and interest of any kind whatsoever of property created in favour of any secured creditor and includes any mortgage, charge, hypothecation and assignment. Therefore, when the bank or financial institution as in the case of Krishna Filaments is acting as a debenture Trustee, then, it will not be required to approach the ordinary civil court but can take recourse to the Securitization Act and consequently, as permissible therein, the RDB Act as well. If the arguments to the contrary are accepted that would mean ignoring and brushing aside the inclusive definitions as noticed by us. Therefore, we are of the view that in the present case, considering the definition of the term "debt" and "financial institution" appearing in the RDB Act, 1993 and the relevant provisions of Securitization Act so also to give full effect to the same, it will have to be held that it was permissible for parties such as Arcil to apply for amendments to the Original Application No. 89 of 2005.

4. So far as assignment of debt is concerned, recently the Hon'ble Supreme Court of India in the case of ICICI Bank Limited v. Official Liquidator of APS Star Industries Ltd. and Ors. decided on 30th September, 2010, has upheld such assignment. It, therefore, cannot be said that ARCIL has no locus standi to move the Company Judge for winding up of the Company by virtue of such assignment.

5. It is not in dispute that the Company's financial position is absolutely bad. In that behalf, we have perused the balance-sheet and the report of the Chartered Accountant. The learned Counsel for the appellant is unable to make out any points in this behalf.

6. The question as to whether the proceedings for winding up of the Company before the Company Court is maintainable on the ground that the principal creditor i.e. Dena Bank has already moved DRT to recover the debt wherein ARCIL is also substituted as an assignee. ARCIL has also moved an application to join as a party to the said proceedings as it has taken over the assets and not liabilities by way of assignment.

7. Mr. Madon has also relied upon the judgment of the Supreme Court in the case of *Viral Filaments Limited v. Indusind Bank Limited* (2001) 4 C L.J. 44 wherein it has been held as under.

19. Mr. Shah then made an argument which appears to us to be one of desperation. He contends that an order of winding up is a discretionary order and where it is possible to ascertain that a large number of employees are likely to be rendered jobless as a result of the order, or where there are other circumstances indicating that the financial stringency is a temporary phase and the company is able to get out of it, there is no need for the Company Court to make an order for winding up. He relied on the judgment of the Company Court of the Gujarat High Court in *Rishi Enterprises in re* (1992) 73 Comp Cas 634 (P&H). What has been held in these two judgments is unexceptionable. If there is a silver lining, then the dark clouds need not impel the Company Court into admitting the petition for winding up the company. But is there a silver lining at all in the appellant's case is the crucial question. We have already referred to the gist of the affidavit in reply filed to oppose admission of the winding up petition. One would have expected the argument to be based on surer foundation. If there was any material presented before the Company Court to indicate that the company's assets far exceeded its liabilities, or that the cash crunch was only a temporary phase, and given a little breathing time, the company would soon come out of straits, the argument could have been considered. After anxiously scanning the affidavit in reply, we find neither any pleading, nor any material particulars which could have satisfied the learned Company Judge on this issue. Thus, the learned Company Judge had nothing but the statutory presumption to fall upon, which he rightly followed up with an order or admission of the petition. Hence, we are unable to say that the learned Company Judge in any way erred in admitting the petition for winding up.

8. Considering the said fact, it cannot be said that ARCIL has no locus to move winding up petition before the Company Court as it is an admitted fact that the debt is assigned by Dena Bank in favour of ARCIL and by virtue of such assignment, winding up petition is filed. As pointed out above, since the Company is unable to pay its debts and since considering the report of the Chartered Accountant and the balance-sheet, the Company is totally insolvent

which, in our view, has rightly been ordered to be wound up by the learned single Judge by giving cogent reasons. The learned Counsel for the appellant is unable to point out that the Company's financial position is sound to meet the liabilities. In fact, looking to the facts and circumstances and considering the report of the Chartered Accountant, in our view, the Company in question deserves to be wound up as it is totally in an insolvent position.

9. Since we do not find any substance in any of the arguments raised by the learned Counsel for the appellant, this Appeal is dismissed by upholding the order of the learned single Judge in the Company Petition. The Official Liquidator may take charge of the affairs of the Company forthwith. No order as to costs.