
(2008) 09 BOM CK 0141
In the Bombay High Court
Case No : C.P. No. 248 of 2008

ICICI Bank Ltd.

APPELLANT

Vs

Sundaram Multi Pap Ltd.

RESPONDENT

Date of Decision : 15-09-2008

Acts Referred:

Citation : (2010) 153 CompCas 424

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : Virag Tulzapurkar, Birendera Saraf, Sachin Chandarana and Ankita Bajpai, instructed by M.K. Ambalal and Co, for the Appellant; Kirit Hakani and Rahul K. Hakani, for the Respondent

Judgement

S.A. Bobde, J.—This is a petition for winding up of the respondent-company for alleged non-payment of a sum of Rs. 2,94,60,698 with further interest at the rate of 18 per cent, per annum.

2. The petitioner-bank claims the aforesaid amount as due under a credit arrangement letter (CAL) and an internal swaps and derivative association master agreement dated October 18, 2007, together with its schedule collectively referred to as "ISDA Agreement". Apparently, the company entered into the aforesaid agreement with the petitioner with a view to protect itself from the losses arising out of adverse fluctuations in the rate of exchange in import export transactions. Broadly, the salient features of the two agreements are as follows:

The company would enter into derivative transactions. If as a result it makes any gains, the petitioner-bank would credit the amount to their account. If there are losses, the petitioner would debit their account. The derivative limits were to be Rs. 15.2 million. The agreements would cover both forward and options contract. The company would deposit such moneys and execute such security documents by way of margin with the bank as may be demanded by it. The agreement was liable to be cancelled upon certain termination events specified in the contract

such as defaults, etc.

3. In the present case, on October 1, 2007, the bank issued a CAL, sanctioning derivative limits to the extent of Rs. 1.52 crores so as to enable the company to enter into forward and options contract and other derivative limits with the petitioners to hedge their currency risk. On October 15, 2007, the company appointed Mr. Jasmin Mehta, the Chief Finance Officer, to execute the ISDA Agreement and to enter into derivative transaction. On October 18, 2007, the board of the company passed a resolution enabling the company to enter into derivative transaction with the petitioner-bank on terms, regulations and conditions laid down by the ICICI Bank for the purpose and resolved to authorise Mr. Jasmin Mehta to enter into transaction under the said agreement. The ISDA Master Agreement was executed on October 18, 2007. It was signed on behalf of the company by said Mr. Jasmin Mehta. Apparently, it is not signed on behalf of the petitioner. That is, however, not significant since the existence of the agreement is not disputed on behalf of the respondent-company and it has been acted upon by the parties. The petitioner sent a requisition on November 7, 2007, for a sum of Rs. 46,00,000 towards the additional cash margin and the company paid the amount of Rs. 46,00,000 to the petitioner.

4. Apparently, on November 23, 2007, the petitioner credited the company's account with an amount of Rs. 14,18,760. On December 12, 2007, the cheque issued by the company for Rs. 1.52 crores was dishonoured. The bank terminated the contract by letter dated December 27, 2007. On December 18, 2007, the petitioner issued the statutory notice which was replied to on December 31, 2007, inter alia, contending that the transactions referred to in the statutory notice are already the subject-matter of High Court Suit No. 3398 of 2007 filed on December 10, 2007 and claiming that the company was fully capable of honouring the cheque, but the amount has been withheld because the petitioner deposited the cheque in spite of knowledge of the suit. There is further correspondence between the parties in which the company has claimed that they had issued a blank cheque and that they are fully solvent with a networth of Rs. 80.57 crores.

5. Mr. Hakani, learned Counsel for the company, submitted that the company bona fide disputes the said liability and has, in fact, filed Suit No. 3398 of 2007 on December 10, 2007, prior to the statutory notice dated December 18, 2007. According to learned Counsel, though the company does not dispute the documents and the contract between the parties, there is a dispute about two transactions dated October 24, 2007 and October 30, 2007, in relation to options and the said transactions have been challenged by the company as illegal, void and not binding on the company. It may be noticed that the contentions of the company are to the effect that they entered into ISDA agreement only for the purpose of export and the resolution taken by the company is not in accordance with the articles of association since it is in excess of the borrowing limits imposed by the articles of association. According to the company, its resolution

was, in fact, drafted by the petitioner-bank in violation of Article 77 of the articles of association and Article 165(d) of the articles of association which require the company to obtain the consent of the company in general meeting to borrow in excess of the limits provided by Article 77. According to the company, the borrowing is itself without any authority and cannot bind the company.

6. On a consideration of the entire matter, it appears that the defence of the company is not bona fide. There is no dispute that the resolution to enter into these derivative transactions and execute agreements with the petitioner-bank was passed by the company. The agreements are signed by the authorised officer of the company, i.e., Mr. Jasmin Mehta. The company paid Rs. 46,00,000 to the petitioner on account of differential margin money demanded by the petitioner. They also issued a cheque for Rs. 1.52 crores towards CAL which was dishonoured on their instructions. Prima facie, therefore, the defence that the agreements in question are void and the two transactions under them are also void does not appear to be substantial. In fact, the petitioner-company also made payment of Rs. 14,18,760 to the company by crediting its account bearing No. 515348420 with the petitioner. No doubt it is contended by Mr. Hakani on behalf of the respondent that the amount has been unilaterally credited by the petitioner by depositing the amount in the company's account maintained by the petitioner. However, that was the mode of payment prescribed by the agreement.

7. It must, however, be noted that the truth or otherwise of the defence taken by the company would be liable to be tested by the court in the suit or other proceedings filed by the petitioner before the Debts Recovery Tribunal. The observations made herein are only prima facie and restricted to the present proceedings for winding up.

8. There is no merit in the contention on behalf of the company that the dispute raised by the company must be treated as bona fide because the company has filed the suit before the statutory notice was issued. Such a suit does not make the dispute bona fide only because it is filed before the statutory notice. It is necessary for the court to examine whether the defence to the company proceedings based on such a suit is substantial. Also it cannot be said that merely because the bank has filed proceedings for recovery under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, before the Debts Recover Tribunal, it cannot maintain the petition for winding up vide *Viral Filaments Ltd., Mumbai Vs. Indusind Bank Ltd., Mumbai*, paragraphs 6 and 7.

9. Mr. Hakani relied on several decisions of various High Courts, including this Court, in support of his contention that the company petition ought not to be entertained because there is a bona fide dispute. All those decisions have not been dealt with here since there is no dispute about the proposition that where the debt is bona fide disputed, the court will not entertain a petition for winding up. It is equally well-settled that whether the dispute is bona fide or not would have to be decided on the facts of each case by the court.

10. In this view of the matter, the respondent-company is directed to deposit a sum of Rs. 2,94,60,698 within a period of eight weeks from today, failing which the company petition shall stand admitted and the petitioner shall advertise the petition in two local newspapers, viz., Free Press Journal, Maharashtra Times and in the Maharashtra Government Gazette. The petitioner shall deposit an amount of Rs. 10,000 with the Prothonotary and Senior Master towards the publication charges within three weeks from the date of default with an intimation to the Company Registrar, failing which the petition shall stand dismissed for non-prosecution.

11. In case the amount is so deposited as directed hereinabove, it shall be transmitted to the credit of Original Application No. 57 of 2008.