
(2013) 05 DEL CK 0051
In the Delhi High Court
Case No : Co. Petition No. 329 of 2011

IFCI Factors Ltd.

APPELLANT

Vs

Koutons Retail India Ltd.

RESPONDENT

Date of Decision : 13-05-2013

Acts Referred:

Companies Act, 1956 — Section 433, 433(1)(a), 433(3), 433(e), 433(e)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 5 AD 249 : (2013) 179 CompCas 235 : (2013) 200 DLT 735

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Anjali Sharma, for the Appellant; Maneesha Dhir with Ms. Priyanka, Advocates and Mr. Karan Khanna with Ms. Asmita Kumar, Advocates for Indian Overseas Bank, for the Respondent

Judgement

S. Muralidhar, J.—IFCI Factors Ltd. ("IFL") has filed this petition u/s 439 read with Sections 433(e) of the Companies Act, 1956 ("Act") seeking the winding up of the Respondent, Koutons Retail India Limited ("KRIL"). The background facts are that in 2010, the company known as Krish International Pvt. Ltd. ("KIPL") approached IFL to avail of sales bill factoring facility to the tune of Rs. 5,00,00,000. The Respondent KRIL was the Approved Debtor. In para 9 of the petition, the nature of a factoring transaction is explained as under:

Essentially, in a factoring transaction what occurs is that in consideration of finance provided by the Factor (which in this case is the petitioner), the borrower (which in this case is the respondent known as "KIPL") assigns the receivables under its commercial transaction to the Factor, and also specifically makes itself liable for rendering all outstanding amounts to the Factor, in the event of the purchaser of goods defaulting in making payment of the borrower's receivables to the Factor. The "purchaser of goods" in the present case is the Respondent company, i.e., Koutons Retail India Ltd.

Effectively, what the Borrower would do in this transaction is to sell goods to its

purchaser (i.e. the Respondent hereto, in the present case); and in consideration of the Borrower executing the relevant factoring documents, it would then be paid an agreed part of the value of the said goods by the Factor (in this case, 80% of the value of the invoice), i.e., the Petitioner. Thereafter, both the purchaser of goods, which is the Respondent hereto in the present case (referred to in the transaction as "Approved Debtor") and the seller (i.e. the "Borrower" in the factoring transaction) would be liable to make payments to the Factor, until receipt of all dues under the transaction by the Factor.

2. An agreement of factoring of receivables (hereafter "factoring agreement") was executed on 18th February 2010 between IFL and KIPL. Apart from the documents executed by KIPL as well as its Managing Director ("MD") Mr. Alok Aggarwal, a notice of assignment of debts dated 16th February 2010 was issued by KIPL and counter-signed by KRIL. This was accepted by KRIL by a separate letter dated 17th February 2010 written to IFL accepting the terms highlighted in the notice of assignment of debts. This letter was signed by Mr. D.P.S. Kohli, Director of KRIL. The factoring agreement with KIPL was acknowledged by KRIL.

3. Apart from KIPL issuing post-dated cheques ("PDCs") in favour of IFL, KRIL also issued PDCs in its favour. Three of the PDCs dated 14th, 15th and 17th May 2010 for Rs. 41,60,023, Rs. 41,51,316 and Rs. 47,09,800 respectively, when presented by IFL for payment, were dishonoured with the remarks "insufficient funds". It is stated that cheques to the extent of Rs. 1.80 crores issued by KRIL in favour of IFL were upon presentation dishonoured for the same reason. Copies of the dishonoured cheques and the advice from the bank regarding the dishonoured cheques have been enclosed with the petition.

4. The case of IFL is that both the Approved Debtor, KRIL, as well as KIPL committed defaults. It is stated that as on the date of the petition, KRIL owed IFL a sum of Rs. 3,33,18,783.88. It is stated that despite notice dated 30th November 2010 issued by registered post to KRIL there has been no response from KRIL. Accordingly, the present petition was filed on 3 August 2011

5. Pursuant to the notice issued in the petition on 4th August 2011, KRIL entered an appearance on 24th November 2011 and was asked to file a reply within a period of six weeks. However, despite several opportunities no reply was filed. Company Application No. 2014 of 2012 was thereafter filed by IFL seeking the appointment of a Provisional Liquidator ("PL"). Notice was directed to issue in the said application on 19th October 2012.

6. It may be mentioned that there are several other creditors who have filed petitions seeking the winding up of KRIL. On 14th February 2013 a batch of such petitions was heard by the Court. This included the present petition as well, KRIL was given a final opportunity till 18th February 2013 to file a proper affidavit clearly indicating its proposal to repay the outstanding dues of the unsecured creditors. On 18th February 2013 an affidavit was tendered in Court by KRIL. Although para 21 of the affidavit purported to deal with all the petitions,

including the present one, filed against KRIL, it did not indicate the amounts owing to IFL in the present petition. Learned counsel for the KRIL then sought time to file an additional affidavit. On 20th February 2013 an additional affidavit was filed by KRIL stating that it did not owe any amount to IFL. The present petition was delinked from the batch of petitions and directed to be listed separately by an order dated 1st March 2013. The right of KRIL to file a reply was closed. Thereafter, the petition was heard on 15th March 2013, 10th April 2013 and today, i.e., 13th May 2013.

7. This Court has heard the submissions of Ms. Anjali Sharma, learned counsel for the IFL and Ms. Maneesha Dhir, learned counsel for the KRIL.

8. Ms. Dhir handed over in Court the written submissions of KRIL enclosing as Annexure 1 thereto a copy of Company Application (M) No. 24 of 2013 in Company Petition No. 329 of 2011. However, the said application purporting to seek sanction for a Scheme of Arrangement was not pressed and, therefore, no notice in the said application has been issued till date.

9. It is first submitted by Ms. Dhir that factoring agreement was only between IFL and KIPL and did not involve KRIL. Consequently, KRIL was not bound by any contract between IFL and KIPL much less by the conditionalities in the Schedule II to the said agreement. In any event these were triable issues which ought not to be decided in a winding up petition. Thirdly, it is submitted that notice dated 30th November 2010 issued by learned counsel for IFL to KRIL was a notice u/s 138 of the Negotiable Instruments Act, 1881 ("NI Act") and not a notice seeking winding up under Sections 433 (3) and 434 of the Act. In the absence of any such legal notice no winding up proceeding can be entertained. Fourthly, it is contended that even the said notice was not sent to the KRIL at its registered office and this is another ground on which the petition should be dismissed. Fifthly, it is submitted that the complaint u/s 138 NI Act filed by IFL was only to the extent of cheques for Rs. 1.80 crores being dishonoured. On the other hand the legal notice demanded payment of over Rs. 3.33 crores. It is submitted that there is neither any admission of liability by KRIL. It is submitted that there cannot be winding up of two companies for the same amount. Reliance is placed on the decisions in State Black Sea Shipping Company and Mr. Joydeb Kundu Vs. Viraj Overseas Pvt. Ltd., , India Foils Limited Vs. SR Foils Limited and Others, , Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, , IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., , CBZ Chemicals Ltd. Vs. Kee Pharma Ltd., , Marina World Shipping Corporation Ltd. Vs. Jindal Exports (P) Limited, , Ranjit Kaur Vs. Healthy Holdings Pvt. Limited, , Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, , Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, , Madison Communications Pvt. Ltd. Vs. Som Distilleries and Breweries Ltd., , Bhoruka Steels Limited Vs. Suresh and Suresh Wires (P.) Ltd., , Laguna Holdings Pvt. Ltd. v. Eden Park Hotels Pvt. Ltd. [Company Petition No. 62 of 2008], Registrar of Companies Vs. Navjivan Trading Finance Pvt. Ltd., ,

Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., , Aventis Cropscience India Ltd. Vs. Nilgiris Fertilizers Ltd., , Akolla Suryanarayana Rao and Others Vs. Dwarapudi Basivireddi and Others, , Chhangamal Harpaldas and Another Vs. Dominion of India and Another, , Shantilal Khushaldas and Bros. Pvt. Ltd. Vs. Smt. Chandanbala Sughir Shah and another, , Meera &Co. Ltd. v. Archies Greetings & Gifts Ltd. [decision dated 17th July 2002 in Co. Pet. No. 320 of 2002].

10. Ms. Anjali Sharma, learned counsel for the IFL pointed out that notwithstanding the fact that legal notice was not sent at the registered office of KRIL, the winding up petition would still be maintainable under Sections 433 (e) read with Section 434 (1) (c) of the Act. Ms. Sharma too placed reliance on the decision in IBA Health (India) Private Limited v. Infor-Drive Systems SDN BHD (supra). It is submitted that there is no denial of the fact that KRIL issued cheques in the sum of Rs. 1.80 crores which were dishonoured upon presentation for payment.

11. The above submissions have been considered. As regards the notice under Sections 433 and 434 of the Act is concerned extensive reliance was placed by Ms. Dhir on the observations of the Court in State Black Sea Shipping Company & Mr. Joydeb Kundu v. Viraj Overseas Pvt. Ltd. In the said decision the Court noted its earlier decision in Kalra Iron Stores v. Faridabad Fabricators (P) Ltd. (1992) 1 Comp. L.J. 310 which drew a distinction between a petition under Sections 433 (e) read with Section 434 (1) (a) and one u/s 433 (e) read with Section 434 (1) (c) of the Act. It was observed that "there cannot be a dispute with regard to the proposition that without even serving a notice as required u/s 434 (1) (a) a creditor can seek for winding up of a company u/s 433 (e) read with Section 434 (1) (c) of the Act on the ground that the company is unable to pay its debts." It was further explained as under:

In order to bring a case within the ambit of Section 434 (1) (c) of the Act, the creditor has to prove to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts the court should take into account the contingent and prospective liability of the company. The purpose of Section 434 (1) (c) read with Section 434 (e) is to determine the basic question of commercial solvency of the company and in determining the aforesaid question the court has to examine the company's inability to pay its debt with reference to the date when it becomes absolutely due for payment along with contingent and prospective liability of the company. The expression "commercially insolvent" has been held to mean that the existing assets and liabilities of the company are such as to make it reasonably certain and the court is satisfied that the existing and probable assets would be insufficient to meet the existing liabilities. The aforesaid proposition was laid down by the Supreme Court in Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, .

12. Even if the legal notice in the present case was not served KRIL at its

registered office, there is no denial by KRIL that it in fact received such notice. Also as explained by the Court in *Kalra Iron Stores v. Faridabad Fabricators (P) Ltd.* as long as IFL is able to demonstrate that there is an admitted liability which KRIL has been unable to pay, it can pursue this petition.

13. It is not in dispute that IFL issued KRIL two notices issued on 30th November 2010 where the total sum claimed was Rs. 1,80,21,139. It is not in dispute that PDCs to that extent issued by KRIL were dishonoured. The issuance of such PDCs constitutes an acknowledgment of liability by KRIL. It also is a demonstration of the inability of KRIL to pay the said amount. Therefore, even if the amount claimed in the petition is Rs. 3.33 crores, i.e., the amount due as on the date of the petition, that will not make difference to the fact that there is an admission by KRIL of its liability to pay Rs. 1,80,21,139 to IFL

14. The defence taken by the KRIL that it was not aware of the factoring agreement deserves to be rejected. The letter dated 16th February 2010 issued by KRIL clearly acknowledged the factoring agreement. The letter dated 17th February 2010 being the notice of assignment of debt issued by KIPL has been countersigned by KRIL. These facts themselves are sufficient for the admission of this petition. While the legal position expounded in the decisions relied upon by learned counsel for KRIL Petitioner are unexceptionable, each of the cases turned on facts distinguishable from the facts of the case on hand.

15.1 In *IB A Health (India) Private Limited v. Info-Drive Systems Sdn. Bhd.*, which has been relied upon by both the parties, the facts were that a settlement was entered into between the creditor and the company in certain proceedings before the City Civil Court in Bengaluru. Thereafter, upon the company defaulting in making payment in terms of the settlement, winding up proceedings were initiated. Relying on certain clauses of the settlement deed, the Company Court admitted the petition. In appeal the company contended that it had paid the creditor a certain sum in terms of the deed of settlement, but that was not by way of an acknowledgment of liability. The Supreme Court summarised the principle as under:

23. The principles laid down in the abovementioned cases indicate that if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability u/s 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

15.2 Responding to the contention of the company that it was commercially solvent, the Supreme Court in *IBA Health (India) Private Limited* observed that the said factor by itself would not be sufficient to reject the petition for winding up. It held:

If there is no dispute as to the company's liability, the solvency of the company might not constitute a standalone ground for setting aside a notice u/s 434(1) (a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed u/s 439 in reliance of the presumption u/s 434(1)(a) that the company is unable to pay its debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.

16. It may be mentioned at this stage that IFL has filed Co. Pet. No. 471 of 2011 against KRIL u/s 433 (e) and 434 read with Section 439 of the Act. In that petition, a detailed order has been passed by the Court on 7th May 2013 appointing the Official Liquidator ("OL") attached to the Court as PL. However, the said order has been kept in abeyance for a period of eight weeks to enable KIPL to make payment of the admitted sum together with up to date interest. In the said order, the Court noted the statement made by learned counsel for IFL in that case "to the extent that KIPL is able to pay the amount owing to IFL, the claims against KRIL to that extent would stand abated. In any event, that is contingent upon KIPL being able to make good the entire amount together with interest owing to IFL".

17. KRIL has questioned the power attorney ("POA") issued in favour of the deponent of the affidavit in support of the present petition by stating that there is no specific authorization to file a winding petition. Reliance is placed on the decision in Shantilal Khusaldas and Bros. Pvt. Ltd. v. Chandan Bala Sughir Shah.

18. In the said decision, the facts were that the constituent attorney was authorized to file suits and/or proceedings against the company for recovery of the amount and also to affirm complaints, affidavits and other pleadings that may be necessary. In the instant case, however, the power attorney executed in favour of the deponent of the affidavit authorizes him to sign and execute on behalf of IFL "all legal documents, instruments, guarantees and agreements" which are required to be executed for and on behalf of IFL in connection with the current and authorized business of IFL and also "sign and verify on behalf of IFCI Factors Ltd. complaints, application, petitions, written statements, affidavits, vakalatnamas and all other documents connected with the legal proceedings that are required to be signed and verified on behalf of IFCI Factors Ltd." The above POA is widely worded and would include an authorization for filing a winding up petition. The decision of the Bombay High Court in Shantilal Khusaldas and Bros. Pvt. Ltd. is distinguishable on facts.

19. In the circumstances, this Court is satisfied that in the present case there is an admission of liability by KRIL in the sum of Rs. 1,80,21,139 together with interest and that KRIL is unable to pay the said sum to IFL. The defence of KRIL for not paying IFL the admitted liability is not bona fide.

20. The petition is accordingly admitted and the OL attached to this Court is appointed as a PL of KRIL. A complete set of the paper book be served on the OL. The OL is directed to take over all the assets, books of accounts and records of the Respondent from the date this order is made effective as indicated hereafter. The OL shall also prepare a complete inventory of all the assets of the Respondent before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required.

21. Publication of the citation of the petition be effected in the Official Gazette, "The Times of India" (English) and "Jansatta" (Hindi) in terms of Rule 24 of the Rules, 1959. The cost of publication shall be borne by IFL. The Directors of KRIL are directed to strictly comply with the requirements of Section 454 of the Act and RULE 130 the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from the date the order is made effective in terms of para 23 below. They will also file affidavits in this Court, with advance copies to the OL, within four weeks thereafter setting out the details of all the assets, both movable and immovable, of KRIL and enclose therewith its balance sheets, profit and loss accounts and copies of the statements of all the bank accounts for the last three years.

22. However, this order is kept in abeyance for eight weeks to enable KRIL to make payment to IFL of the sum of Rs. 1,80,21,139 together with up-to date interest, failing which this order will be made operational and further steps will be taken by the OL in terms of this order. The right of IFL to seek other available remedies to recover the balance sum owed to it by KRIL is reserved. If the payment of the sum aforementioned is not made by KRIL to IFL within the time granted, IFL will inform the OL forthwith to enable to OL to take further steps in terms of this order. In that event, a compliance report will be filed by the OL before the next date of hearing. List on 25th September 2013.