(2001) 09 BOM CK 0055

In the Bombay High Court

Case No : Company Petition No. 749 of 2001

Janakalyan Sahakari Bank Ltd. APPELLANT

Vs

Windmill Hotels Private Limited RESPONDENT

Date of Decision : 28-09-2001

Acts Referred:
Companies Act, 1956 — Section 433, 434, 439, 443(2)

Citation : (2002) 109 CompCas 311

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : S.S. Shah and Rajesh Nagory, instructed by V. Deshpande and Co, for the Appellant; R.C. Shah C.D. Patel and J.B. Patel, for the Respondent

Judgement

R.J. Kochar, J.—The petitioner is a co-operative bank registered under the Maharashtra Co-operative Societies Act, 1960. It has prayed for an order under Sections 433, 434 and 439 of the Companies Act, 1956, to wind up the respondent-company alleging failure on the part of the respondent-company to pay the debt of the petitioner to the tune of Rs. 36,90,609.30 inclusive of interest on the principal amount of Rs. 21,51,650.

2. From the averments in the petition it appears that the petitioner-bank had disbursed to the company, the following credit facilities :

(a) Demand loan of Rs. 10 lakhs on June 16, 1997.

(b) Temporary overdraft of Rs. 5 lakhs in June, 1997/July, 1997.

(c) Cheque purchase facility of Rs. 7 lakhs on June 13, 1997.

3. It is further averred that the aforesaid loan facilities were disbursed to the company for a temporary period and the same were repayable with interest at the rate of 19 per cent. p.a. with quarterly rests, on demand. It is further alleged by the petitioner-bank that the company was grossly irregular and no repayment was made by the company in spite of repeated demands and reminders and in

spite of the repeated promises and assurances to pay the entire debt by the company. It is further averred that the company had issued a cheque on April 11, 2000, for Rs. 3,00,000 towards part payment of the outstanding dues of the company but the said cheque was dishonoured for the reasons "funds insufficient". It is further disclosed by the petitioner-bank that proceedings u/s 138 of the Negotiable Instruments Act, 1881, are pending before the Metropolitan Magistrate''s Court, Bandra. According to the bank, the company again in several letters admitted and acknowledged its liability and repeatedly assured to take steps to repay the petitioner''s dues but all in vain. It is further disclosed by the petitioner-bank that it has filed a recovery application before the Assistant Registrar, Co-operative Societies for recovery of the debts from the company. It is further averred that the petitioner-bank had sent a statutory notice upon the company u/s 434 read with Sections 433 and 439 of the Companies Act, calling upon the company to repay its debt or face winding up proceedings. The petitioner has relied on the correspondence between the parties which is annexed to the petition.

4. On receipt of the notice of hearing of the petition for admission, the respondent-company has appeared to contest the petition and has filed its affidavit in reply. I have gone through the proceedings and I have also heard learned counsel for the parties. Shri Shah learned counsel for the petitioner has pointed out from the pleadings how the entire claim of the bank is an admitted, ascertained and liquidated amount based on the documents executed between the parties. He further pointed that there is no denial or dispute of the debt payable by the company to the bank. It was further pointed out from the letters written by the company to the bank that the company had acknowledged and admitted the amount of the debt. It is further pointed out , that the company had sought waiver of interest and that they were ready and willing to pay the principal amount. Shri Shah further submitted that at no point of time had the company paid any amount as per the negotiations which had taken place between the parties. Shri Shah has further pointed out that the company is facing financial difficulties so acutely that even a cheque for Rs. 3 lakhs issued by the company to the bank was dishonoured and that the company had no sufficient funds even to the tune of Rs. 3 lakhs. Shri Shah has therefore submitted that the company has absolutely no bona fide dispute or defence and that it should be wound up in the interest of the creditors and in the interest of the public at large. According to learned counsel the recovery proceedings u/s 101 of the Maharashtra Co-operative Societies Act, 1960, which are pending before the court do not bar the petitioner- bank from filing the present company petition for winding up. According to Shri Shah this petition is not for recovery of the amount but it is for the purpose of winding up of the company as it has become unable to pay its debts to the creditors. According to Shri Shah the provisions of Section 91 of the said Act do not exclude or override the provisions of the Companies Act, 1956 and that the petitioner can independently maintain a winding up petition u/s 439 of the Companies Act.

5. Shri R.C. Shah, learned advocate for the company has raised the following points of the defences :

(a) u/s 91 of the Maharashtra Co-operative Societies Act, 1960, the bank should have raised a dispute before the Co-operative Court and should not have filed the present company petition which according to the learned advocate is not maintainable. Shri R.C. Shah submits that Section 91 bars all other proceedings under any law which are contemplated u/s 91 of the Maharashtra Co-operative Societies Act.

(b) The petitioner-bank having filed a recovery suit, u/s 101 of the Maharashtra Co-operative Societies Act, the company petition for winding up amounts to a pressurising tactics and therefore, it should not be entertained.

(c) There was no agreement between the parties to pay interest and the bank is claiming interest on the loan amounts.

(d) The petitioner-bank had agreed to disburse a loan of Rs. 55 lakhs but had disbursed only Rs. 22 lakhs whereby the company has suffered financial difficulties and it could not manage its affairs for want of the balance disbursements. Shri R.C. Shah has submitted that the petitioner- bank is resorting to coercive methods from all the sides. The bank has already filed recovery proceedings before the Co-operative Court and it has also filed a criminal case before the Metropolitan Magistrate and has sought winding up of the company in this petition. According to Shri R.C. Shah, the present proceeding is nothing but a recovery proceedings in the garb of a winding up petition.

6. As far as the point of jurisdiction of this court is concerned there is no substance in the submission of the learned advocate for the company that Section 91 of the Maharashtra Co-operative Societies Act takes away the jurisdiction of the company court u/s 439 of the Companies Act. The purpose of Section 439 read with Sections 433 and 434 of the Act is altogether different and it cannot be said that Section 91 has taken away the powers and jurisdiction of the company court u/s 439 to order winding up of a company which has become unable to pay its debts and which fails and neglects to pay the debts to its creditors. The bank has filed recovery proceedings u/s 101 of the Maharashtra Co-operative Societies Act and the same are pending. In the present petition though it appears that the bank has averred that the company has failed and neglected to pay off its debts the purpose of the petition does not appear to be recovery of the said debt for which it has already instituted an independent proceeding u/s 101 of the Maharashtra Co-operative Societies Act. Merely because the averments and background is stated in respect of the disbursement of loan and failure on the part of the company to pay the same it does not mean that the present proceedings are initiated by the bank for recovery of the amount. The jurisdiction of the Companies Act is to order winding up of a company which is unable to pay its debts and the court has to exercise its jurisdiction under just and equitable circumstances.

7. In the present case the defences raised by the company are frivolous and of vexatious nature. I do not find any substance in the dispute raised by the company. It cannot be accepted that there was no agreement between the parties to pay interest on the loan amount disbursed by the bank. It is pertinent to note that the bank had advanced the loans on interest and the company has time and again prayed for waiver of interest. It has nowhere said that the company was not liable to pay interest as there was no such agreement to pay interest. On the contrary the company has requested for the bank to waive the interest as the company was in financial difficulties. There is therefore no substance in this point. The second point of defence in respect of grievance that the bank had agreed to disburse Rs. 55 lakhs and had disbursed only Rs. 22 lakhs. This cannot be made a point of defence that the bank ought to have disbursed the entire amount of Rs. 55 lakhs and as it had not done so, that entitles the company to not pay the debt due to the bank. This contention again is frivolous and vexatious and is stated only to be rejected.

8. It is a fact that proceedings u/s 101 of the Maharashtra Co-operative Societies Act are instituted by the bank and the same are going on. However, it is not the law that a civil suit filed for recovery of a debt per se would bar the company petition or that a company petition would not be maintainable or cannot be entertained. It would depend on the facts and circumstances of each case. In the present case the company has not raised any bona fide dispute against the debt claimed by the petitioner- bank. A company petition can be maintained when there is no bona fide dispute raised by the debtor company and in that case it need not be told to file a civil suit for recovery of its debt. Such debtor companies would obstruct and thwart smooth movements of the wheels of the business and industry to affect the society at large adversely and to slow down the economic progress. If the company raises any bona fide dispute in reply to the statutory notice u/s 434 and if the company court is prima facie satisfied that the dispute cannot be resolved without a deeper investigation in a regular trial, the other remedy contemplated u/s 443(2) of the Companies Act, could be said to be an appropriate remedy for recovery of such uncertain, unadmitted debt which is of not a definite nature. Availability of other remedy for recovery of a debt is not always a bar for admission of a company petition where there is no bona fide dispute of the debt. I therefore, hold that initiation of recovery proceeding u/s 101 of the Maharashtra Co-operative Societies Act does not bar the present company proceeding which is not exclusively or only for recovery of its debt but it has a larger purpose to inform the other creditors and the society at large that the company is not commercially solvent and is unable to pay its debts. As far as its actual debt is concerned the Registrar u/s 101 of the Maharashtra Co-operative Societies Act shall hold proper enquiry to determine the debt and shall issue proper recovery certificate to the bank for recovery of the amount as provided therein. In the present case it has not created any bar as the debt is not bona fide disputed by the company.

9. According to me, the points which are raised by the company are not bona

fide but are of frivolous and vexatious nature. There is absolutely no substance in the defences taken by the company. The debt is based on written documents executed by the company. The company has time and again admitted and acknowledged the debt payable by it to the bank. It has requested the bank to waive the interest. I am therefore satisfied that the company has absolutely no defence and no bona fide dispute is raised. It would therefore be in the interest of the creditors and public at large to protect and save them from such companies which even go to the extent to contend that while getting loan from the bank they had not agreed to pay interest and that such loans were interest free, and that the banks had agreed to disburse the amount of Rs. 55 lakhs but had not disbursed the balance of Rs. 30 lakhs whereby the petitioner-bank itself is blamed for the financial difficulties of the company. If the company had raised any bona fide dispute about the debt, in that case the contention of the company that the petitioner-bank had availed of the other remedy of recovery of proceedings could be appreciated. In the absence of any bona fide dispute it is not possible for me to accept the said contention that the bank having resorted to recovery proceedings u/s 101 of the Maharashtra Co-operative Societies Act the company petition u/s 439 of the Companies Act cannot be maintained.

10. In these circumstances the petitioner-bank has made out a good case for admission of the petition. The petition is therefore admitted and fixed for hearing on January 10, 2002. The petitioners to advertise the admission of the petition in Free Press Journal, Navshakti and Maharashtra Gazette. The petitioners to deposit a sum of Rs. 2000 with the Prothonotary and Senior Master within a period of four weeks from today.

11. All concerned to act on a copy of this order duly authenticated by the Company Registrar.

12. In view of the findings recorded by me it would be in the interest of justice to restrain the company from dealing with the assets of the company in any manner subject to the rights of the secured creditors.

13. Shri R.C. Shah the learned advocate for company prays for stay of the advertisement. Prayer is rejected.

