
(2014) 05 DEL CK 0274

In the Delhi High Court

Case No : Co. Pet. 221/2012 & Co. Appl. No. 261/2013

Jumbo Chemicals and Allied Industries Private Limited

APPELLANT

Vs

M/s. Arjun Industries Limited

RESPONDENT

Date of Decision : 22-05-2014

Acts Referred:

Companies Act, 1956 — Section 433(c), 433(e), 433(f), 434, 434(1)(a)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17(1),
19, 19(1)

Citation : (2014) 6 AD 726 : (2014) 187 CompCas 342 : (2014) 210 DLT 726

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Dinkar Singh, Advocate for the Appellant; Virender Ganda, Mr. Vipul Ganda and Mr. Santosh Giri, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J.—The present petition has been filed by the petitioner company under Sections 433(e) & (f) and 434 read with section 439 of the Companies Act, 1956 (hereinafter referred to as the "Act") inter alia praying for winding up of the respondent company on the ground that the respondent company had failed and neglected to pay a sum of Rs. 28,99,00,000/- alongwith interest, which was claimed as due and payable by the respondent company, on account of financial facilities granted by Industrial Development Bank of India (hereinafter referred to as "IDBI") to the respondent company. The amount receivable by IDBI from the respondent company was assigned to Kotak Mahindra Bank Ltd. (KMBL) which in turn assigned the same to the petitioner herein. The petitioner company has also prayed that it is just and equitable to order winding up of the respondent company as the respondent company had failed to commence its business operation within a period of one year from the date of its incorporation.

2. Briefly stated, the relevant facts areas follows:-

2.1 IDBI and the respondent company entered into a "Rupee Term Loan

Agreement" dated 07.10.1996. In terms of the said agreement IDBI sanctioned a loan for a sum of Rs. 367 lakhs and in pursuance thereof, disbursed an amount of Rs. 329 lakhs from time to time. Further, IDBI and the respondent company also entered into a "Foreign Currency Loan Agreement" dated 06.11.1996 whereby a foreign currency loan of DM 779105 equivalent to Rs. 183 lakhs was sanctioned and a sum of DM 4,92,557 equivalent to Rs. 124.81 lakhs was disbursed by IDBI.

2.2 The respondent company defaulted in the repayment of the amount due under both the loan agreements and by a recall notice dated 10.06.1998, IDBI called upon the respondent company to pay the amounts due to it along with interest. By a notice dated 26.06.1998, IDBI invoked the guarantee clause and called upon the guarantors to liquidate the dues of the respondent company. However, the respondent company and its guarantors failed to repay the outstanding loan amounts.

2.3 Thereafter, IDBI filed an Original Application (OA No. 445/1998) u/s 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 before the Debts Recovery Tribunal, Delhi (hereinafter referred to as "DRT") for recovery of Rs. 6,19,93,815/- along with interest @ 21% per annum from 01.12.1998 and liquidated damages. By an order dated 28.05.1999, the DRT issued a Recovery Certificate in favour of IDBI and the same was challenged by the respondent company in a writ petition (W.P. (C) No. 4656/1999) filed before this Court. By an order dated 01.05.2000, this court remanded the matter to DRT permitting the respondent company to file its written statement.

2.4 In March 2006, the respondent Company approached IDBI with One Time Settlement (OTS) offer to pay a sum of Rs. 225 lakhs as full and final settlement of the dues of IDBI. The said proposal was considered by the Northern Zonal Committee of IDBI in its meeting held on 21.03.2006 and approved on 27.03.2006. The said Committee decided not to accept the offer made by the respondent but instead to accept an amount of Rs. 250 lakhs out of which Rs. 225 lakhs was to be paid at the issuance of the LOI and balance amount of Rs. 25 lakhs to be paid by 30.03.2006 and in any event not later than 30.06.2006. The respondent claimed that the despite sanction/approval of the OTS proposal by the Committee of IDBI on 27.03.2006 and a specific direction of the Committee to communicate the said approval to the respondent, IDBI had failed to make or communicate any such OTS offer to the respondent.

2.5 Thereafter, IDBI assigned the said debt in favor of Kotak Mahindra Bank Ltd. (KMBL) by an assignment deed dated 31.03.2006. On 12.12.2006, the DRT also substituted KMBL in place of IDBI in proceedings in OA No. 445/1998. The respondent company challenged the said assignment before the Debts Recovery Appellate Tribunal (DRAT) and by an order dated 06.02.2007, the DRAT stayed the proceedings pending before the DRT. Aggrieved by the same, KMBL filed writ petition (W.P. (C) No. 3535/2007) before this court and by an order dated 23.05.2007, the DRAT order was set aside and parties were directed to appear

before the DRT, which was directed to examine afresh the defence of the respondent company. The respondent company had also filed a writ petition (W.P. (C) No. 5258/2008) before this Court challenging the assignment of debt to KMBL, however, the same was withdrawn by the respondent company on 24.02.2009.

2.6 In the meantime, KMBL assigned the said debt in favor of the petitioner herein by an assignment deed dated 16.04.2008. The respondent company filed a writ petition (W.P. (C) No. 6557/2008) before this court seeking an order restraining IDBI from assigning the debt to any third party and a direction to IDBI to accept the OTS. Further, the respondent company also sought quashing of the assignment of debt by IDBI to KMBL. The said writ petition was dismissed by this court by an order dated 02.02.2011. The said order dated 02.02.2011 was challenged by the respondent company before a Division Bench of this Court in a Letters Patent Appeal (LPA No. 380/2011) which was also dismissed by the Division Bench by an order dated 19.12.2011.

2.7 The petitioner company filed an application before the DRT for substitution as a party in place of KMBL being an assignee of the debt. The said application was contested by the respondent inter alia on the ground that the petitioner was neither a bank nor a financial institution and was therefore not qualified to be an applicant or petitioner before the DRT in terms of section 17(1) read with section 19(1) of the Recovery of Debt due to Banks and Financial Institutions Act, 1993. On 16.08.2012, orders on the said application were reserved by the DRT and are yet to be delivered. However, by order dated 07.07.2010, the DRAT in a related proceedings wherein the petitioner had sought its substitution, ruled that the petitioner was, indisputably, neither a bank nor a financial institution and was therefore not covered u/s 19(1) of the Recovery of Debt due to Banks and Financial Institutions Act, 1993. Consequently, it could not be substituted in place of a bank.

2.8 Thereafter, the petitioner company issued a statutory notice dated 23.12.2010 u/s 434(1)(a) of the Act calling upon the respondent company to pay a sum of Rs. 28,99,00,000/- along with interest. The respondent company did not respond to this notice. Thereafter, the petitioner filed the present petition for winding up of the respondent company.

2.9 It is relevant to mention that this court was not inclined to issue notice in the petition due to the orders passed by this court in earlier round of litigation between the respondent and petitioner's predecessor in interest, however, on the statement made by the learned counsel for the petitioner company that the petitioner was confining its debt to the OTS amount relied upon by the respondent i.e. Rs. 250 lacs, this court issued notice to the respondent, on 24.05.2012. By an order dated 26.08.2013 in CA No. 261/2013, this court directed the respondent company to deposit an amount of Rs. 250 lacs with this court to be placed in a fixed deposit, without prejudice to the rights and contentions of both the parties. The petitioner was also directed to deposit the

title deeds of the properties to balance the equities. In terms of the said order, the respondent deposited a sum of Rs. 250 lacs with the registry of this court, without prejudice to its rights and contentions.

3. The learned counsel for the petitioner submitted that the petitioner, being an assignee of the debt by the KMBL, has stepped into the shoes of the assignor/ KMBL and therefore, the debt is due and payable by the respondent company to the petitioner. It is submitted by the petitioner that the respondent company has failed and neglected to pay the amount due and admitted by the respondent in its balance sheets for the years 1998-99, 2001-02, 2002-03 and 2004-05 filed with the Registrar of Companies. It was further contended that in view of the failure of the respondent company to respond to the notice u/s 434(1)(a) of the Act, it ought to be presumed that the respondent is unable to pay its debts.

4. The learned counsel for the petitioner has contended that the respondent company is also liable to be wound up as the company had failed to commence its business within one year from the date of its incorporation. It is submitted that the respondent company was incorporated with the objective of setting up of a 100% export oriented unit with an installed capacity of 1920 TPA for processing various spices. However, the respondent did not start its commercial production and has not been doing any business for the last about 19 years i.e. since its incorporation. It is submitted that the respondent company has admitted the loss of its substratum. The fact that the respondent company has been unable to commence its business since its incorporation, is also admitted. And, therefore, the respondent company ought to be wound up.

5. The learned counsel for the respondent disputed the claim made by the petitioner in the winding up petition and denied its liability towards the amount claimed. The respondent claimed that the IDBI had failed to disburse the sanctioned loan, more particularly the working capital margin money of Rs. 113 lakhs and also a symbolic disbursement of Rs. 25 lakhs, as a result whereof the respondent could not sustain its production activities and had to close its operations. It is submitted that the respondent company had also filed a counter claim against the IDBI inter alia claiming an amount of Rs. 7838 lakhs for the losses suffered due to non-disbursement of working capital. It is stated by the respondent that the counter claim is still pending for adjudication before the DRT.

6. It was submitted by the respondent that this court issued notice in the petition, by an order dated 24.05.2012, on the petitioner confining its claim in the petition to Rs. 250 lakhs. It was submitted that the respondent company had deposited an amount of Rs. 250 lakhs with this court as directed on 26.08.2013, without prejudice to its rights and contentions. It was claimed by the respondent that the above events showed the ability of the respondent company to pay its dues and therefore, the present proceedings in the nature of winding up of company are not maintainable and the same are liable to be dismissed.

7. It was contended by the respondent that the petitioner is not entitled to any

interest on the amount of Rs. 250 lakhs. It was contended that, if any interest is payable to the petitioner, the same would be from the date of the order of this court (24.05.2012) when the petitioner had confined its claim to Rs. 250 lakhs and not from 27.03.2006.

8. The learned counsel for the respondent contended that it was not open for the petitioner to argue that the respondent was liable to be wound up u/s 433(c) or Section 433(f) of the Act. He submitted that a case of Section 433(c) was not made out by the petitioner in its pleadings and only a bare statement had been made that the respondent had not commenced business. He submitted that there was no reference to Section 433(c) in the pleadings. He also pointed out that the notice issued by this Court was confined to a claim of Rs. 250 lacs and, therefore, the petition ought to be confined to Section 433(e) of the Act. He submitted that since the respondent had deposited the amount of Rs. 250 lacs in Court, which was the debt as admittedly payable, the petition was liable to be dismissed.

9. I have heard the learned counsel for the parties.

10. The controversy to be addressed in the present case is whether the respondent company is liable to be wound up on account of its inability to pay its debts. It is also necessary to consider whether the petitioner has made out a case for winding up of the respondent company u/s 433(c) or Section 433(f) of the Act and whether, in the given facts, this court should exercise its discretion to wind up the company under those provisions.

11. At the outset, I must note that the notice of this petition was issued, on 24.05.2012, as the petitioner had confined its claim, for the purposes of this petition, to the One Time Settlement offer relied upon by the respondent i.e. a sum of Rs. 250 lacs. At the material time, the learned counsel for the petitioner had also submitted that the petitioner also claims interest on the OTS amount from the date of approval of the proposal, till the date of payment. The said order passed by this Court is quoted below: -

In view of the aforesaid pronouncements by two Division Benches, this Court was initially reluctant to issue notice in the matter. However, today Mr. Sudhir Nandrajog, learned senior counsel for petitioner, on instructions of Mr. Shailender Singhal, authorised representative of the petitioner company, states that petitioner is confining its debt to the OTS offer relied upon by the respondent, namely, the OTS for Rs. 250 lakhs made by IDBI in the meeting held on 21st March, 2006 and the minutes whereof were approved on 27th March, 2006. Mr. Sudhir Nandrajog, learned senior counsel for petitioner prays that respondent should also be asked to pay a rate of interest as determined by this Court from the date of the proposal till the date of payment.

Keeping in view the aforesaid submissions made by Mr. Sudhir Nandrajog, learned senior counsel for petitioner, this Court is of the view that the debt claimed in the present petition should be restricted to the amount reflected in the

minutes of IDBI dated 27th March, 2006.

12. The learned counsel for the petitioner, during the course of the arguments, sought to contend that the debt owed by the respondent was much larger than the sum of Rs. 250 lacs, however, he was not permitted to urge the same in view of the aforementioned order of this Court. Accordingly, the inability of the respondent to pay its debts has considered in reference to the admitted debt of a sum of Rs. 250 lacs and interest thereon. The respondent was directed to deposit the said sum with this court and the said direction was complied with by the respondent without prejudice to its rights and contentions. Thus, for the purposes of considering whether the respondent should be wound up u/s 433(e) of the Act, the only issue that remained was with respect to the interest payable by the respondent on the aforesaid sum. The respondent contended that no interest was payable as the offer for settlement of debt for Rs. 250 lacs had never been communicated to the respondent and it is only during the present proceedings that the respondent had indicated that it was willing to settle the disputes for a sum of Rs. 250 lacs. In these circumstances, according to the respondent, the interest, if any, could only run from the 24.05.2012 i.e. the date of the order and not prior to the said date. In my view, this contention is wholly erroneous. The respondent had approached IDBI and had offered a sum of Rs. 225 lacs as full and final settlement of its dues. This offer was considered by a Committee of IDBI in its meeting held on 21.03.2006 and the same was not accepted. The Committee decided that a counter offer of Rs. 250 lacs should be made. The entire sum was to be discharged latest by 30.06.2006. According to the respondent, this counter offer was never communicated to the respondent. However, it was the case of the respondent in the writ petition (W.P. (C) 6557/2008) that the respondent was only liable to pay the amount, which IDBI had decided to accept and accordingly the respondent had prayed for an order directing IDBI to accept the OTS amounting as approved by IDBI on 27.03.2006. It is apparent from the facts that there was no concluded agreement between IDBI and the respondent for the settlement of the dues payable by the respondent. The offer made by the respondent for Rs. 225 lacs was rejected and, therefore, the same also did not fructify into a binding contract. Even as per the respondent, since the counter offer had never been communicated to the respondent, the question of its acceptance resulting in a binding contract did not arise. Although, there was no binding agreement between the respondent and IDBI, the respondent had been contending that it was only liable to pay Rs. 250 lacs as had been approved by the committee members. Thus, according to the respondent own showing, the respondent would be liable for interest on the said amount from 27.03.2006 i.e. the date of approval of the counter offer by the concerned committee of IDBI. The respondent cannot on one hand insist that it settle its dues on the terms as considered by IDBI on 21.03.2006/27.03.2006 and on the other hand plead that interest should run from 24.05.2012.

13. In this view, the respondent could be called upon to pay a reasonable interest on the sum of Rs. 250 lacs provided the petitioner was willing to accept

the same as full and final settlement of its dues. While the learned counsel for the respondent indicated that respondent would be willing to pay simple interest @12% per annum from 27.03.2006, the same was not acceptable to the petitioner. The petitioner contended that the respondent would be liable to pay 21% compounded interest, which was stated to be the contractual rate of interest in terms of the agreement between IDBI and the respondent. This was seriously disputed by the respondent. The aforesaid narrative clearly indicates that no settlement could be arrived at between the parties.

14. In view of the above, I am unable to conclude that the respondent is unable to pay its debts. The petitioner had confined its claim, for the purposes of the present petition to a sum of Rs. 250 lacs which was deposited by the respondent. The question whether the respondent is liable to pay the contractual rate of interest on the said sum is vexed question and in any view cannot be considered as having been admitted by the respondent. The claim made by IDBI/KMBL is being contested by the respondent and the respondent has also preferred counter claims. In this view, it cannot be stated that failure on the part of the respondent to pay compound interest which is disputed by the respondent indicates its inability to pay its debts. It is well settled that the legal fiction of section 434(1)(a) would be applicable only in cases where a company accepts that a debt is due and payable. In the present circumstances where the debt claimed by the petitioner is being stoutly disputed, the omission to pay the same cannot lead to a conclusion that the respondent is unable to pay its debts and, resultantly, should be wound up.

15. The next question to be addressed is whether the respondent company is liable to be wound up u/s 433(c) or 433(f) of the Act. Although, the pleadings filed by the petitioner does mention that the respondent has not commenced its business, the focus of the petition is not that the respondent is liable to be wound up on account of non-commencement/suspension of business. The petitioner had confined the petition only to a claim of debt, at the time of issuance of notice. This by itself would be reason enough for not permitting the petitioner to urge that the respondent has lost its substratum and should be wound up on account of its failure to commence business. Having stated the above, I deem it appropriate to also consider the merits of the said contention.

16. In order to consider whether a company should be wound up u/s 433(c) on account of non-commencement of public suspension of business, it would be necessary to investigate whether there is a good reason for the same and whether there is reasonable chance for the company to be revived. The Patna High Court in the case of Registrar of Companies Vs. Bihar Wire and Wire Products Pvt. Ltd., has listed out the various principles that must be considered while determining whether a company should be wound up u/s 433(c) of the Act:-

(1) That the mere fact that business has not been commenced within a year or that business has been suspended for a whole year or more by itself is not a ground for a court to order winding up, although they give the jurisdiction to the

court to do so.

(2) That it has to be found out whether the non-commencement or suspension of business was for some good reason accounting for it.

(3) That the fact of non-commencement or suspension of business is an evidence which indicates that the company has no intention of carrying on business or that it is not likely to do so.

(4) That the decisive question is whether there is a reasonable hope of the company commencing or resuming business and doing it at a profit, and whether the substratum of the company has disappeared.

17. The respondent has submitted that it could not commence its business on account of failure on the part of the IDBI to adhere to its obligations. The respondent is also pursuing a counter claim against IDBI and it was contended that the company would be able to revive itself, once the said controversy is decided. It is also to be borne in mind that winding up of a company has serious consequences and the Courts have always leaned towards ensuring that the ailing companies are given a fair and reasonable opportunity to revive. In the present case, the company is pursuing its counter claim against IDBI and the question whether the company would be able to revive or not can only be considered after that controversy has concluded. Concededly, the jurisdiction to wind up a company u/s 433(e) and 433(f) of the Act is discretionary. In my view, this is not a case where this court should exercise its discretion to wind up of the company. Further, no prejudice has been caused to the petitioner by the existence of the respondent company.

18. In view of the above, the present petition is dismissed. The Registry is directed to refund a sum of Rs. 250 lacs along with interest, if any, to the respondent. The title documents deposited by the petitioner be also returned to the petitioner. It is further clarified that neither this order nor anything stated during the present proceedings should be construed to mean that the petitioner has confined its claim only to a sum of Rs. 250 lacs and interest thereon. Similarly, neither this order nor the present proceedings should be construed to mean that the respondent has given up its counter claims against IDBI.

19. In view of the above, all pending applications also stand disposed of.