

(2012) 02 BOM CK 0185

In the Bombay High Court

Case No : Appeal (Lodging) No. 85 of 2012 in Company Petition No. 47 of 2011

Katare Spinning Mills Limited

APPELLANT

Vs

Kotak Mahindra Bank Limited

RESPONDENT

Date of Decision : 08-02-2012

Acts Referred:

Companies Act, 1956 — Section 433, 434(1)

Citation : (2012) 3 ALLMR 294 : (2012) 3 BomCR 83 : (2012) 114 BOMLR 818 : (2012) 4 MhLj 193

Hon'ble Judges : Mohit S. Shah, C.J;Ranjit More, J

Bench : Division Bench

Advocate : Ashutosh A. Kumbhakoni with Mr. Amit Vyas, Mr. Shardul Singh and Ms. Nikita Ajwani instructed by M/s. Jajani Associates, for the Appellant; Kishore Jain and Mr. Tushar Garodia, for the Respondent

Final Decision : Dismissed

Judgement

Mohit S. Shah, C.J.—This appeal is directed against the order dated 1 February 2012 of the learned Company Judge of this Court admitting the winding up petition filed by the respondent herein (hereinafter referred to as "the bank" or "the petitioning creditor") and appointing the official liquidator as the provisional liquidator of the appellant-company with all powers under the provisions of the Companies Act, 1956 (hereinafter referred to as "the Act").

2. The appellant-company had taken a loan from the ICICI, Mumbai under the Loan Agreement dated 14 August 1997. In the year 2000, ICICI had called upon the appellant to repay the outstanding amount with interest and other charges. The appellant-company had suggested the proposal for settlement by way of one time resettlement of loan. Ultimately, on 12 December 2001, ICICI agreed to accept the one time settlement (OTS) of the company at Rs. 3.50 crores subject to certain conditions. According to the petitioning creditor, the appellant did not abide by the conditions, but the appellant did make some payments purporting to pay towards the part payment of OTS.

3. It appears that under a Deed of Assignment dated 31 March 2005 and the Deed of Confirmation dated 20 April 2005, Kotak Mahindra Bank Limited (petitioning creditor) stepped into the shoes of ICICI and thereafter filed winding up petition No. 5 of 2006 against the appellant-company in this Court on 28 November 2005. During pendency of the said petition, the Debt Recovery Tribunal, Pune issued an interim recovery certificate for an amount of Rs. 3.27 crores. After giving credit for the payments made by the appellant, the petitioning creditor claimed an amount of Rs. 3.16 crores on the basis of the said interim recovery certificate. The Company Court, therefore, passed an order dated 8 June 2006 after referring to the admission made by the appellant-company in its affidavit-in-reply to the said company petition No. 5 of 2006, that is admission of the liability to pay Rs. 3.16 crores as the principal amount plus interest thereon.

4. At the hearing of the said winding up petition, after considering the rival submissions, the Company Court passed the order on 14 July 2006 disposing of the winding up petition (company petition No. 5 of 2006) in the following terms:

7) In my view, considering the totality of the circumstances, one opportunity needs to be given to the Company to pay the admitted sum atleast. The matter was adjourned to enable Mr.Risbud to take instructions. Now, his instructions are that the Company seeks two years time for payment of a sum of Rs. 3,16,00,000/-. This request is opposed by Shri Goradia.

8) In my view, the following order would meet the ends of justice;

(a) Respondent Company is directed to deposit a sum of Rs. 3,16,00,000/-in monthly installments of Rs. 26 lakhs each on or before 31st December, 2007. The said amount shall stand transferred to the credit of the Original Application filed by the petitioner.

(b) Thereupon, it would be open for the Petitioner to make appropriate application for adjustment and appropriation of this amount towards the decretal claim.

(c) Needless to state that such application shall be considered on its own merits and in accordance with law.

(d) At the request of Mr.Risbud the first installment of rupees Twenty Six Lakhs be deposited on 15th of September, 2006 and every installment thereafter shall be paid on 15th of each succeeding month till the entire amount stipulated above is deposited.

(e) In the event of the Company failing to deposit the first installment or committing default in payment of any two installments the company petition shall stand admitted and to be advertised by the petitioner in Free Press Journal on payment of usual charges.

(f) Needless to state that if the amount is deposited within the time stipulated

then the same will be dealt by the D.R.T./Recovery Officer in accordance with law. All contentions in that behalf of both sides are specifically kept open.

(g) Ad-interim orders passed on 8th June, 2006 by this Court shall continue and liberty is reserved to the petitioner to apply for appointment of Provisional Liquidator in the event of the respondent committing default in payment of first installment or any two subsequent installments.

5. There is no dispute about the fact that the appellant-company did pay the aforesaid amount of Rs. 3.16 crores by 31 December 2007 and that the question of appointing the provisional liquidator did not arise.

6. Thereafter, the DRT made order dated 20 August 2009 directing issuance of recovery certificate in favour of the petitioning creditor and against the appellant-company. On the basis thereof, the recovery officer issued the recovery certificate for an amount of Rs. 8,86,68,936/-together with interest at 10% per annum from 8 April 2004 (the date of application before the DRT) till realization.

7. On the basis of the above recovery certificate and calculating the interest on the principal amount, the petitioning creditor issued notice to the appellant-company calling upon the company to pay the bank an amount of Rs. 14.26 crores together with further interest from 1 March 2010 and other charges. The appellant-company submitted its reply dated 1 April 2010 contending that ICICI had accepted the OTS of the company for an amount of Rs. 3.50 crores which constituted a new agreement, superseding all the previous agreements. The bank thereupon filed the present company petition (No. 47 of 2011) on 7 January 2011.

8. In the meantime, the appellant-company had challenged the order of the DRT before the Debt Recovery Appellate Tribunal in appeal being Appeal No. 285 of 2009 and filed application for waiver of condition of pre-deposit being Misc. Application. No .969 of 2009. On that application, DRAT passed order dated 18 July 2011 directing the appellant to deposit a sum of Rs. 6.50 crores by 30 September 2011, failing which the appeal shall not be entertained. The appellant-company's review application from that order is still pending before DRAT.

9. The learned Company Judge before whom the winding up petition of the bank was pending, referred to the aforesaid orders and noted the contention of the bank that the recovery was sought for the sum of Rs. 15.56 crores in January 2011. The learned Company Judge thereafter passed order dated 14 November 2011 directing the appellant-company to deposit an amount of Rs. 1.50 crores without prejudice to the rights and contentions of both sides. In default, the Court would pass an order of admission of the winding up petition and also consider the request of the petitioning creditor for appointment of the Official Liquidator as a Provisional Liquidator.

10. In the order dated 12 January 2012, the learned Company Judge noted that the appellant-company had brought a pay order for a sum of Rs. 1.5 crores.

However, the time was required to be extended for deposit of the same. Ultimately, in the impugned order dated 1 February 2012, the learned Company Judge noted that though the time was granted to deposit the pay order of Rs. 1.50 crores, the same was not deposited with the Registry and therefore, the learned Company Judge passed the impugned order admitting the winding up petition and for publication of the advertisement.

It is the aforesaid order which is challenged in this appeal.

11. Mr.Kumbhakoni, learned counsel for the appellant has submitted that the appellant is ready and willing to deposit Rs. 1.5 crores as directed by the order dated 14 November 2011 but once the amount is deposited, the company petition should be dismissed. It is submitted that the winding up petition is not maintainable because even though the petitioning creditor is having recovery certificate issued by the Debt Recovery Tribunal, it has not resorted to execution of the said certificate. Placing reliance on provisions of section 433(e) read with section 434(1)(b), it is submitted that only after the petitioning credit resorts to execution proceedings on the basis of the recovery certificate issued by DRT and only if the execution process is returned unsatisfied in whole or in part, the petitioner-bank can resort to winding up proceedings. It is submitted that since the appellant has already filed an appeal before the Debt Recovery Appellate Tribunal and the appeal is still pending, it cannot be said that the appellant has no bonafide dispute to the claim made by the petitioning creditor. Placing strong reliance on the decision of the Apex Court in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., , it is submitted that party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bonafide disputed debt. The Company Court cannot be reduced to a debt collecting agency or as a means of bringing improper pressure on the company to pay a bonafide disputed debt.

12. It is vehemently submitted by the learned counsel for the appellant that when the appellant-company had already entered into an OTS settlement with ICICI for a sum of Rs. 3.50 crores and the appellant-company has paid the entire amount to ICICI and petitioning creditor and winding up petition No. 5 of 2006 filed by this very petitioning creditor arising from the same debt had been disposed of by this Court in terms of order dated 14 July 2006 requiring the appellant to deposit a sum of Rs. 3.16 crores by 31 December 2007, and the appellant complied with the said order the second winding up petition in respect of the same debt is not maintainable.

13. It is also submitted that the appellant is a going concern with 470 employees who are being paid monthly wages of Rs. 21 lakhs. For the year ended 31 March 2011, the company had turnover of Rs. 44.95 crores and profit before depreciation of Rs. 1.45 crore as against the loss of Rs. 19 lakhs in the previous year ended 31 March 2009. It is submitted that if the company petition is admitted, the company will stop getting raw materials on credit and the company will not be able to continue with the manufacturing activities and the company

will thereafter not be able to restart the manufacturing operations and that will trigger a series of cross defaults in statutory obligations which will result in acute insolvency.

14. The learned counsel for the appellant-company has also submitted that the petitioning-creditor has not placed on record the amount of consideration paid by the petitioning creditor to ICICI for taking assignment of the debt in question but in any view of the matter, the appellant is ready and willing to deposit a sum of Rs. 3.25 crores as per the following schedule: (over and above the amounts paid earlier)

(i).Rs. 1.50 crores to be paid by 17 February 2012.

(ii) Rs. 1.00 crores by 16 March 2012.

(iii) Rs. 0.75 crores by 30 March 2012 Rs. 3.25 crores.

15. On the other hand, the learned counsel for the petitioning-creditor has opposed the appeal and supported the judgment of the learned Company Judge.

16. Having heard the learned counsel for the parties, we have given our anxious consideration to the rival submissions.

17. As regards the appellant's contention that the petitioning creditor cannot invoke Section 433(e) of the Companies Act for winding up on the basis of the recovery certificate issued by the Debt Recovery Tribunal, so long as the recovery certificate is not returned unsatisfied in whole or in part, we are not required to express any opinion, because the appeal deserves to be allowed on other grounds, particularly having regard to the fact that the first winding up petition being Company Petition No. 5 of 2006 by this very petitioning creditor against the same company was dismissed by this Court in terms of order dated 8 June 2006 which was complied with by the company (i.e. the appellant herein) and also because the appellant-company has agreed to pay a further amount of Rs. 3.25 crores over and above the amounts paid by the appellant-company in compliance with the said order dated 8 June 2006 in the above company petition. The fact that the appellant-company has raised a defence about one time settlement between ICICI and the appellant-company and the petitioning creditor claims to be a mere assignee from ICICI and that the defence of the company on this ground is pending examination before the Debt Recovery Appellate Tribunal, are also relevant facts indicating that the appellant-company has raised a bonafide dispute which is pending before another forum.

18. As held by the Supreme Court in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., , the Company Court is not to be reduced as debt collecting agency or as a means of bringing improper pressure on the company to pay a bonafide disputed debt.

19. The appellant-company is a going concern with 470 employees and has turned around the corner with turn-over of Rs. 44.95 crores and cash profits

(profit before depreciation) of Rs. 1.45 crores in the year ended 31 March 2011, as against the loss of Rs. 19 lakhs in the previous year ended 31 March 2009. Any order of admitting the winding up petition at this stage will trigger a series of cross defaults which will result in acute insolvency, without the appellant-company getting any chance to argue its appeal pending before the Debt Recovery Appellate Tribunal.

20. In view of the above discussion, we allow the appeal in the following terms:-

The impugned order of the learned Company Judge is set aside. The company petition No. 47 of 2011 will stand dismissed, if the appellant-company deposits with the DRAT a sum of Rs. 3.25 crores as per the following schedule:-

(i). Rs. 1.50 crores to be paid by 17 February 2012.

(ii).Rs. 1.00 crores to be paid by 16 March 2012.

(iii). Rs. 0.75 crores to be paid by 30 March 2012 Rs. 3.25 crores.

In case of default in payment of any amount as aforesaid, this appeal shall stand dismissed and the order of the learned Company Judge shall stand revived and shall stand confirmed.

21. In either event, whether or not the company deposits the aforesaid amounts, the injunction given by the learned Company Judge restraining the appellant-company from transferring, alienating, encumbering, transferring, creating any third party rights or in any manner disposing of or parting with possession of immovable properties of the company shall continue to operate till the aforesaid amount of Rs. 3.25 crores is deposited.

22. It is clarified that we may not be treated to have expressed any opinion on merits of the appeal pending before DRAT.