(2009) 08 MAD CK 0106

In the Madras High Court

Case No : Company Petition No. 68 of 2009

Kotak Mahindra Bank Ltd. APPELLANT

Vs

Subhiksha Trading Services Ltd. RESPONDENT

Date of Decision : 28-08-2009

Acts Referred:

Companies (Court) Rules, 1959 — Rule 24, 96
Companies Act, 1956 — Section 237, 433, 434, 439(1), 450(2)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2009) 152 CompCas 165

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : H. Karthik Seshadri, for the Appellant; T.V. Ramanujun for Prakash Goklaney, for the Respondent

Judgement

P. Jyothimani, J.—This company petition is filed under Sections 433 (e) & (f) read with Sections 434, 439(1)(b) and 237 of the Companies

Act, 1956, for direction to wind up the respondent company, M/s. Subhiksha Trading Services Ltd. (in short, ''the Company'').

2. The respondent company was incorporated as a private limited company on 10.4.1997 with authorized share capital of Rs. 33 crores consisting

of 33 crore equity shares of Re. 1/- each and its main objects are as follows:

(a) To trade in any articles, goods, rights possessions of any nature and of any use being industrial, commercial, household, technical and in such

process to buy, sell acquire, lease any merchandise, goods or property of any form whatsoever as authorised dealers, stockists, agents, brokers,

factors and render all such services in the ordinary course of business to market the goods in a consumable state.

(b) To carry on the business of importers, exporters, buyers, sellers, dealers, stockists, suppliers, wholesalers, retailers, jobbers, contractors,

storers, lessors, hirer of goods of every description and goods, components, sub-components, consumables, peripherals or products or articles

involved in the goods and to act as agents for any products or articles involved in the goods and to act as agents for any such articles, goods or any

services for Indian or overseas principals.

(c) To carry on, in any mode, the business of storekeepers in all its branches and in particular to buy, sell and deal in goods, stores, consumable

articles, chattels and effects of all kinds, both wholesale or retail and to transact every kind of agency business.

3. On the request of the respondent company, the petitioner bank granted a working capital demand loan of Rs. 15 crores on 13.12.2006 with a

special limit of cash credit of Rs. 5 crores. In addition to that, a revolving short term loan of Rs. 15 crores was also sanctioned and the said short

term loan should be used for suppliers of food grains and pulses to the Company. The said working capital demand loan and cash credit facility

were granted on the basis of pari passu first charge on assets of the respondent company and pari passu second charge on the movable assets of

the company.

4. The Managing Director of the respondent company Mr. R. Subramanian, executed various documents including promissory note and deed of

hypothecation regarding movable assets and current assets of the Company in favour of the petitioner bank. A deed of guarantee dated

13.12.2006 was also executed by him. The other lender banks have also given no objection for pari passu charges. Thereafter, the facility was

enhanced to Rs. 30 crores against working capital demand loan and a supplement deed of hypothecation was entered into apart from the deed of

guarantee by Mr. R.Subramanian. Again, the said facility was enhanced to Rs. 50 crores on 31.7.2007. An additional limit of Rs. 25 crores was

sanctioned on 20.8.2007. The company has repaid an amount of Rs. 15 crores and the company has failed to repay the balance of Rs. 35 crores

with interest. As per the terms of sanction, the respondent company has to route a minimum amount of Rs. 20 crores per month through cash

credit account maintained with the bank and the company has never acted as per the terms. There was negligible cash flow with the petitioner bank. The Managing Director of the company, on discussion, agreed to pay the entire amount by 31.3.2008, which was not honoured.

5. The petitioner sent various letters to the respondent including the letters dated 2.7.2008, 9.8.2008 and 19.8.2008. In fact, in the letter dated

19.8.2008, the petitioner bank stated that there was a mutual agreement between the parties to waive all additional interest and charges and

accordingly, the respondent company was to pay Rs. 3597.27 lakhs to the petitioner on or before 30.9.2008, which the respondent failed to pay

and even after the time was extended, the Company did not pay the amount. The Company, by letter dated 30.9.2008, requested the petitioner to

renew the limit till 31.12.2008 stating that the facilities would be repaid on or before 31.12.2008, to prove its bona fide also enclosed a cheque

dated 31.12.2008 drawn in favour of the petitioner towards repayment of entire facilities. The interest was increased to 16.50% p.a. from

1.10.2008, but the company failed and neglected to pay the dues of the petitioner. The cheque dated 31.12.2008 issued by the Company for Rs.

35 crores was returned unpaid by its bankers when deposited by the petitioner and a notice u/s 138 of the Negotiable Instruments Act was issued.

6. As on 17.1.2009, Rs. 38,66,88,190.87 was due from the respondent Company as well as Mr. R.Subramanian. together with an additional

interest at the rate of 2% p.m. at monthly rests from 16.1.2009 till the date of payment in full. By notice dated 19.1.2009, the facilities were

recalled by the petitioner demanding the sum due to the extent of Rs. 38,66,88,190.87 comprising the principal amount of Rs. 35 crores and

interest of Rs. 2,17,72,452.93 and penal interest of Rs. 1,49,15,737.94 together with further interest at the rate of 2% p.m. at monthly rests from

16.1.2009. The petitioner has also invoked the personal guarantee executed by Mr. R.Subramanian. Despite the statutory notice issued on

19.1.2009, the respondent Company failed to make any payment. However, the respondent has raised technical objection that the notice was not

served at the registered Office of the respondent Company.

7. In the reply given by Mr. R.Subramanian. dated 12.2.2009, even though he sought for the recall of notice dated 19.1.2009, there was no denial

of liability. That was replied by the petitioner on 18.2.2009. Through public media, it is understood that the respondent Company has defaulted to pay statutory dues including salary of employees and provident fund dues and Mr. R.Subramanian has given a press statement that the Company

requires additional funds of Rs. 300 crores to resurrect the Company from the financial crisis. The Company has even defaulted in payment of

rents in respect of retail stores across the country since August, 2008. The petitioner has stated that Mr. R.Subramanian has floated several private

limited companies to act as procuring agent for the Company and has diverted the funds from the Company to those Companies. The amounts,

according to the petitioner, were diverted to various associate entities like, M/s. Cash and Carry Wholesale Traders Pvt. Ltd., Custodial Services

India Pvt. Ltd., Pentagon Trading Services Pvt. Ltd., Shevaroy Holiday Resorts Pvt. Ltd., Triad Trading Services Pvt. Ltd., etc. The associate

entities are controlled over by Mr. R.Subramanian along with few others. The said Mr. R.Subramanian is having 59% of shareholdings of the

Company and therefore, the conduct of Mr. R.Subramanian requires a detailed investigation by lifting the corporate veil.

8. The Company has also not finalised the books of account from March, 2007. The respondent Company has borrowed sums in excess of Rs.

800 crores from various lenders and as on date, there are no assets worth the name available in the Company and the Company requires Rs. 300

crores to restart its operations. The Company has not submitted stock statements to the petitioner since November, 2008 and there are no details

available with the petitioner about the stock of the respondent Company as on date. Various shops throughout the country wherein the respondent

Company was running business have been locked and therefore, it is necessary to have a detailed investigation about the affairs of the respondent

Company. There is an apprehension that Mr. R.Subramanian has willfully transferred the assets of the company to various other entities.

9. A reference to the correspondence from ICICI Venture to Provident Fund, Tax and Insurance agencies, which was forwarded by the Company

to the petitioner under the cover of letter dated 9.2.2009 shows the apprehension of the petitioner is correct. The letter shows that Mr.

R.Subramanian is the sole decision maker of the Company, that the Company was promoted by a partnership firm called, R.S. Associates, that the

Company was facing a financial crisis from November, 2008 which is contrary to the statement of Mr. R.Subramanian, that KPMG appointed by the Board is not able to get any information from Mr. R.Subramanian despite its efforts, that the Board was not provided audited accounts for 15

months, that there is a precarious situation and that there is no transparency and openness in the affairs. Hence, the petitioner filed this petition for

winding up of the respondent Company.

10. In the counter affidavit filed by the respondent, it is stated that the Company which was incorporated in 1997 operating large number of small

stores selling day to day use goods in the neighbourhood of middle class customers and the same has been acknowledged throughout India and the

Company has been purchasing substantially from the manufacturers and selling the goods to the customers by offering 10% discount. Mr. R.

Subramanian who has promoted the company is a well-qualified professional and is a graduate of IIT, Madras and IIM, Ahmedabad and he is the

Chairman of the India Retail Forum and he is a Founding and Governing Board member of the Retailers Association of India. The company''s

business model has been emulated throughout India and the company being the largest retailer is having about 1600 stores as on 30.9.2008 and

the company''s investors like, ICICI Venture invested in the company on five occasions and purchased shares from others on a separate occasion

over a period of eight years starting from August, 2000. The company had more than 150 stores and Rs. 330 crores of sales in 2005-06 and

1300 plus stores and over Rs. 2300 crores sales in the year 2007-08 and it is a profitable company paying higher tax continuously.

11. In 2008-09, the Company engaged in a large capital expansion estimated at Rs. 1000 crores and the share value of the Company was

estimated at Rs. 2300 crores and it was due to the collapse in the stock market, the ability of the respondent Company to raise capital got

vanished and there was a sudden dearth of liquidity in the system. Owing to tight liquidity, the operations of the Company have been stalled since

January, 2009 and its debt needs restructuring and to restart the business, the Company requires Rs. 250 to Rs. 300 crores.

12. The respondent has, on the other hand, attributed the global economic recession for the failure of the Company. The Company as an employer

accounted for about 15,000 workers/employees who were servicing over 25 million customers a month and therefore, the revival of the Company is important not only to the lender banks but also to the customers and non-lender banks who are suppliers of goods and who render services. It is

stated that out of Rs. 50 crores of loan, the company has paid Rs. 15 crores in 2008. It is stated that the bank obtained post-dated cheques and

threatened to take action u/s 138 of the Negotiable Instruments Act. It is stated that the bank has threatened to make the Company as a willful

defaulter under the Reserve Bank of India Guidelines. It is stated that large number of creditors are keeping quiet and they are interested in the

revival of the Company and resumption of its business.

13. It is also stated that Corporate Debt Restructure (CDR) mechanism is pending and in respect of six banks out of 13 banks, the last date was

fixed as 31.7.2009 and thereafter, the CDR scheme was not invoked. It is stated that the Company is not alienating any hypothecated goods. The

respondent also attributed motive on the conduct of the petitioner on the basis that the petitioner is acting in coercive manner. It is also denied that

the assets of the Company have been secreted and the security is rendered illusory. It is stated that the Company has a long and excellent credit

track record with the petitioner bank and the petitioner bank which had in the initial stage granted small amounts, later extended the loan limit by

considering the repaying capacity of the respondent Company. It is stated that the facilities granted to the suppliers of the Company and also

granted to the Company were repaid to the bank and on the repayment of Rs. 15 crores, the outstanding amount was reduced to Rs. 35 crores

and there was no specific date for repayment in respect of Rs. 35 crores as it was in the nature of cash credit facility. There was a revolving and

continuous credit facility and therefore, the alleged amount was due. Since the petitioner was a small bank having a limited network the respondent

Company found it difficult in operating the account.

14. It is stated that the petitioner bank offered further loan of Rs. 25 crores which was not accepted by the respondent Company. The cheque

which is stated to be bounced was obtained by coercion and it is a blackmail by the petitioner bank. It is stated that the petitioner bank is making

wild allegations to cover its negligence. It is stated that the petitioner bank has earlier obtained an ex parte order of appointment of provisional

liquidator by misrepresentation. The Official Liquidator had gone into the affairs of the Company in respect of merger and reported to the Court

that the affairs of the Company were not conducted in any manner prejudicial to the interest of the public, particularly when the Company was

admittedly in trouble.

15. It is stated that the accounts of the Company had been audited for the periods ended 31.3.2007 and for the quarter ended 30.6.2007 and the

latest financial year was extended to 15 months ending on 30.6.2008 to coincide with the merger programme. The consideration of accounts was

adjourned by the Annual General Body Meetings and therefore, it is not willful. The audited accounts of the company for the year ending

31.3.2008 show that the Company had fixed assets of Rs. 446 crores and inventories of Rs. 551 crores adding up to a total value of Rs. 997

crores and the secured loans are to the value of Rs. 640 crores out of which, Rs. 515 crores loans were secured by first charge over these Rs.

997 crores and the balance Rs. 125 crores was secured by security of shares apart from second charge on the assets. It is also stated that the

stock statements have been regularly verified without any default till September, 2008. It is stated that in respect of appointment of provisional

liquidator the matter is before a Division Bench of this Court on appeal. It is also stated that 70% of the total debts are covered directly under

CDR programme. It is stated that there is no floating or siphoning off of funds and there is no serious situation that exists warranting admission of

the winding up petition.

16. The Company is having a very good track record of repayment and there are many businesses and industries worldwide which have been

badly hurt by the recession and on the part of the respondent Company, it is only a temporary inability to pay its dues and that cannot be a ground

for ordering winding up. The respondent Company is taking steps for debt reorganisation under the provisions of the Companies Act and the filing

of winding up petition is only to hamper the creditors and others involved in the Company''s reorganisation and it is only a blackmail tactics by the

petitioner bank. It is stated that if the petitioner bank wants to recover the amounts on the basis of the default committed by the respondent

Company, it can invoke its right under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the intention of the petitioner bank is to use the winding up as a coercive tool to advance its commercial interests. It is stated that the petitioner

bank is aware of the process of reconstruction of business taken by the respondent and in spite of the same, the present petition is filed for winding

up which is not permissible.

17. It is seen in this Company Petition that there was an earlier order passed by this Court. Taking note of the serious situation, by order dated

31.3.2009, by dispensing with the notice u/s 450(2) of the Companies Act, this Court appointed the Official Liquidator as provisional liquidator,

directing him to take charge of the assets of the Company as an interim measure. This Court also directed publication of the Company Petition in

one issue of Tamil daily ''Dinamani'' and two English dailies, ''Times of India'' and ''Indian Express''(All India Edition).

18. On the representation by the learned senior counsel appearing for the respondent Company in the above company petition and in the

applications filed by the respondent Company in C.A. Nos. 443 and 444 of 2009, this Court, by subsequent order dated 3.4.2009, taking note of

the fact that the respondent would furnish security or deposit the amount proportionate to the claim amount made by the petitioner by way of

settlement, ordered the publication to be deferred, making it clear that the earlier order appointing Official Liquidator shall not stand in the way of

negotiation between the parties.

19. By a subsequent order dated 15.4.2009, this Court granted stay of publication of the appointment of provisional liquidator, but refused to stay

the appointment of Official Liquidator indicating that the presence of Official Liquidator shall not stand in the way of the debtor company to effect

any restructuring done through financial institutions. This Court suspended the publication of appointment of the provisional liquidator in Application

No. 443 of 2009 and C.A. No. 444 of 2009 was also closed as no further orders are required. In the said stay order it is also stated as follows:

11. It is hereby made clear that apart from the accounts in electronic form 1.4.2008 to this date, the balance sheets of immediate three preceding

years and the statements of the banks in respect of its operations, with all its liabilities and assets as on today shall be filed in the format as provided

for in the Company Court Rules within a period of ten (10) days from today

(15.4.2009).

20. It appears that as against the said order, an appeal has been filed and the Division Bench of this Court has stayed the said appointment of

provisional liquidator and the appeal is pending. However, it is admitted that there is no stay in respect of further proceedings in the above

Company Petition. Therefore, the company petition has been taken up for hearing.

21. It is the submission of the learned Counsel for the petitioner, Mr. Karthik Seshadri that the stay of appointment of Official Liquidator as

provisional liquidator by the Division Bench does not hamper the power of this Court in dealing with the main Company Petition for appointment of

Official Liquidator after admitting the company petition. It is his submission that once the inability of the respondent to repay the debt is admitted on

the facts, the company petition has to be admitted and on the facts and circumstances of the case, it requires a detailed investigation by the Central

Government. It is his submission that as on date, nobody knows as to what are the assets of the respondent Company and there is absolutely

nothing on record to enforce the rights of secured creditors including the petitioner and the CDR proposal has failed.

22. It is seen in the letter of the respondent Company dated 9.2.2009 addressed to the parties, filed as Annexure-P35 under the caption, ''note on

important events'', that there has been a large scale vandalism of the properties of respondent at various parts of the country by anti-social elements

taking advantage of the respondent''s inability to defend the properties suitably. It is further stated that the northern Indian belt and Gujarat and

parts of Maharashtra are the ones so far impacted and the loss estimates are not yet known. It is stated that with the limited manpower the

respondent is not able to react. The fact that the respondent Company has become in deep financial crisis is specifically admitted by Mr. R.

Subramanian, Managing Director of the respondent Company in the following words:

...At each of these meetings the rapidly deteriorating situation on the ground was highlighted to all and also that assets of the company were being

destroyed all over because of complete lack of control due to non-payment of salaries, etc.

23. It is also stated that due to the fact that the respondent is not able to control its various stores throughout India, there is a massive looting and it

is stated as follows:

...Unfortunately despite best efforts of ours and the banks a solution could not be found and we were pushed to default on commitment to pay

Oct. and Nov. 2008 salaries latest by 31st Jan 2009 and post this all hell has broken loose. We have no control on shops data and assets and the

warehouses in most parts of the country for last 2 months or more which has also delayed completion of the June 2008 audit and the review for

further periods.

24. It is also stated that ICICI Venture, which is forming part of the respondent Company has taken efforts apart from ICICI Bank being the

creditor/money lender and the CDR programme is pending. As submitted by the learned senior counsel for ICICI Bank, the last date for CDR

proposal was 31.7.2009 and nothing fruitful has happened and thereafter, the Scheme came to an end and there is no possibility of restructuring

under CDR Scheme and it is also not in dispute that out of 13 banks who have lent moneys by way of loans only six banks have originally

accepted to form part of CDR programme which has also failed.

25. In the letter dated 27.1.2009 addressed to the Commissioner of Provident Fund, the Chief Commissioner of Income Tax, the Director General

of Service Tax and the Employees State Insurance Corporation, the erstwhile Directors of the respondent Company, viz., M/s. Rama Bijapurkar,

Kannan Srinivasan, Renuka Ramnath and Rajeev Bakshi have stated that all of them have been retiring from the position of Non-Executive

Directors of the Board of the company. It is stated by them that they have received notices from suppliers alleging non-payment of dues and

threatening legal action against the Company, which is contrary to the facts and figures as placed by the Managing Director, R. Subramanian

before the Board from time to time.

26. It is also stated that the entire financial affairs of the company have been under the control of the Managing Director and the Board of Directors

have requested the Managing Director to give full accounts about the day-to-day affairs of the company, liabilities, etc. and KPMG was appointed

to conduct an independent review about the Company''s affairs, which was not able to get any particulars. It is also stated by the Board of

Directors as follows:

...Further it is pertinent to note that the company has not provided to the Board, audited accounts for the fifteen month period ended June 30,

2008.

The said directors have clearly stated as follows:

We, the members of the erstwhile Board of Directors of the Company would like to place on record our concerns on the manner of functioning of

the company, lack of openness and transparency in even sharing information with the Board, possible misleading and false representations that may

have been made to the Board by the MD and the overall manner of conduct of day-to-day affairs of the company by the MD, which has resulted

in grim business situation, unpaid salaries for months to employees and overall loss to the company''s reputation which was once upon a time

touted as India''s largest chain of consumer stores.

27. In the circumstance which has been exposed even by the Board of Directors it is to be looked into as to whether a grave situation is in

existence or not for the Court to exercise its jurisdiction u/s 433 of the Companies Act, 1956 on the ground of inability of the respondent

Company to pay off its debts and also on the ground that it is just and equitable that the Company should be wound up.

28. It is no doubt true that the winding up is a last resort and such course would not normally be resorted to when there is a scope for making the

Company live and act. On the facts and circumstances of the case, the liability of the respondent towards the petitioner bank as claimed in the

statutory notice dated 19.1.2009 remains undisputed. Further, the above factual position as narrated by the Board of Directors itself shows that

the respondent Company is not able to have control over its own stocks, assets, etc. It is a very strange situation wherein the respondent Company

even as on date is not able to bring to light its actual assets available apart from existence of its stocks. It is anybody''s knowledge that the

respondent Company has been involving in the sale of perishable commodities also which formed part of the stock in trade and there is absolutely

nothing to be presumed that any stock in trade in that regard even if it is available, is of any value for the purpose of payment to the creditors. In any event, the respondent Company which has just raised such a huge amount from various creditors is bound to explain as to what are the assets

available as on date. When the respondent Company is totally out of control in respect of its assets, there is no purpose in refusing to interfere at

least at this stage to find out as to whether there are any assets available and to retain the same in the interest of creditors to a limited extent.

29. Admittedly, the CDR Scheme is not in operation and six banks out of 13 lender banks were parties to the CDR proposal which has come to

an end and there is no purpose in holding that CDR Scheme would do something better. It is certainly a total chaos and deadlock in the business of

the respondent and the respondent has also not furnished any particulars about various shops situate throughout the country. There are umpteen

number of cases where the employees are making demands for their dues, because there was no control by the Board of Directors of the

respondent Company over the shops throughout India and there was vandalism and ultimately, the creditors whether they are lending creditors like,

banks or non-lending creditors like, suppliers and persons who have rendered services will be left in lurch.

30. The defence raised by the respondent in the counter affidavit is of no substance. Prima facie there are ample evidence to prove that the

respondent Company is unable to pay off its debts. The judgments relied upon by the learned senior counsel for the respondent Company are all

relating to cases where decision was arrived at for winding up after advertisement and hearing the parties and not at the stage of admitting the

company petition. Therefore, there is a grave situation in existence and this Court is of the view that the Company Petition has to be admitted and

publication has to be effected as per Rule 96 read with Rule 24 of the Companies (Court) Rules, 1959. However, in respect of appointment of

Official liquidator as provisional liquidator, I am of the view that the same has to be decided after publication is effected and after disposal of

appeal by the Division Bench of this Court on proper application made by the parties concerned.

31. For all the foregoing reasons, I pass the following orders:

(a) Admit.

(b) The petitioner is directed to advertise in Tamil Nadu Government Gazette fixing the date of hearing as 22.9.2009.

(c) The petitioner is directed to publish the company petition in one issue of Tamil daily, ''Daily Thanthi'' and in one issue each of English dailies,

''The New Indian Express'' and ''Times of India'' (All India Edition), fixing the date of hearing as 22.9.2009.

(d) The petitioner is directed to publish the company petition in advance, giving not less than 14 days clear notice.

(e) Call the company petition on 22.9.2009.

