

(2009) 11 BOM CK 0002

In the Bombay High Court

Case No : Company Petition No. 279 of 2009

L and T Finance Limited

APPELLANT

Vs

International Hometex Limited

RESPONDENT

Date of Decision : 13-11-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Companies Act, 1956 — Section 433, 434

Citation : (2010) 1 BomCR 196 : (2010) 112 BOMLR 878

Hon'ble Judges : Chandrachud D.Y., J

Bench : Single Bench

Advocate : S.I. Joshi, for the Appellant; Rustom M. Pardiwala, instructed by Mulla and Mulla and CBC, for the Respondent

Judgement

Chandrachud D.Y., J.—The petitioner entered into an agreement for lease on 7th March, 2007 in regard to certain plant and machinery. Under the agreement the petitioner granted a lease finance facility in the amount of Rs. 50lacs. The First respondent undertook to pay lease rentals of Rs. 33.85 per thousand aggregating to Rs. 43,03,292.50 in accordance with the schedule to the lease agreement. Under the schedule the company was liable to pay delayed payment charge of 18% per annum with monthly rests. The lease period was thirty six months. The First respondent fell into arrears in the payment of lease rentals. By a statutory notice dated 15th December, 2008 under Sections 433 and 434 of the Companies Act, 1956, the Advocate for the petitioner called upon the company to pay a sum of Rs. 39.61 lacs comprising of overdue lease rentals of Rs. 14.02 lacs delayed payment charges of Rs. 1.32 lacs and the unmatured lease rentals of Rs. 24.26 lacs. There was no reply to the statutory notice. The petitioner has instituted arbitral proceedings since the lease agreement contains an arbitration clause. The arbitral proceedings are pending and the award is awaited. In a petition u/s 9 of the Arbitration and Conciliation Act, a learned Single Judge of this Court granted an ad interim injunction on 10th June, 2009 restraining the company from disposing of the leased assets which order was confirmed on 22nd

July, 2009 when the petition came to be disposed of.

2. On behalf of the petitioner it has been submitted that though the petitioner has taken recourse to an arbitral proceedings for the recovery of its dues, a company petition for winding up would be maintainable. On the other hand, it was urged on behalf of the company that once the petitioner has taken recourse to its remedies for the recovery of its dues, a petition for winding up would not lie. There is a basic fallacy in the defence which has been urged on behalf of the company. It is a well settled principle of law that a petition for winding up is not a remedy for the recovery of dues. A petition for winding up u/s 433 Clause (e) can be instituted where the company is unable to pay its debts. A statutory fiction is created u/s 434 where a creditor issues a notice-to a company to pay its debt and the company fails to do so within the prescribed period. Therefore a creditor who has instituted a suit for the recovery of its dues would not be foreclosed from instituting a petition for winding up on the ground that the company is not able to pay its debts.

3. This view has been accepted in a judgment of a Division Bench of this Court consisting of Mr. Justice B.N. Srikrishna and Mr. Justice S.A. Bobde in *Viral Filaments Limited v. Indusind Bank Limited* 2001 (4) Bom.C.R. 175 wherein it was held thus:

On first principles, we are unable to agree with the learned Counsel that a petition presented u/s 433(e) of the Companies Act, 1956 for winding up of a company is or equivalent to an application seeking recovery of a debt due to the petitioning creditor. In the first place, Section 433 of the Companies Act, 1956 is not intended to supplant the jurisdiction of a Civil Court to adjudicate a money suit. Section 433(e) vests in the Company Court the jurisdiction to winding up a company, inter alia under Clause (e), if the company is unable to pay its debts. Section 434 creates a statutory fiction that if the creditor has issued a prescribed notice to the company to pay up the debt and the company fails to do so or fails to secure the said debt within the prescribed time, the company shall be deemed to be unable to pay its debt. Once such a contingency has arisen, and the statutory fiction has come into play, it is perfectly, open to the Company Court to entertain the petition u/s 433(e) of the Companies Act, 1956.

4. The Division Bench relied upon the judgment of the Supreme Court in *Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd.*, where the Supreme Court held that a claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect that the company has become commercially insolvent and the power to order winding up is contained in the Companies Act and is conferred upon the Company Court. The view of a learned Single Judge of the Andhra Pradesh High Court in *Shapoorji Pallonji Finance Ltd. Vs. Shree Rayalaseema Alkalies and Allied Chemicals Ltd.*, only reiterates the position that if a debt is disputed and if it requires adjudication, then a proceeding u/s 433 would not lie. However, the mere fact that the creditor has instituted a proceeding for the recovery of its dues would not establish that the

debt is disputed. Any creditor whose debt has not been paid, has to take recourse to the normal remedies available under the law for the recovery of its dues by filing a suit and whereas in the present case there is an arbitration clause, by initiating arbitral proceedings. But the mere institution of proceedings for the recovery of dues by a creditor does not establish that the debt is disputed. The question as to whether the debt is disputed is a matter which has to be evaluated by the Company Court in the event that a petition for winding up is filed. In the present case, the fact that there is no reply to the statutory notice for winding up is an admitted position. The fiction u/s 434 of the Companies Act, 1956 therefore comes into operation. That apart, in the reply that was filed on behalf of the company on 27th April, 2009 to the petition u/s 9 of the Arbitration and Conciliation Act, 1996 the company has clearly admitted that it "could not make payment of the lease rent on account of the temporary liquidity problems faced by them", (paragraph 11). In paragraph 8 of the reply which has been filed to the petition for winding up similarly it has also been admitted on behalf of the company that the manufacturing activity of the company is not functioning at present due to unavoidable circumstances.

5. Absolutely no bona fide defence has been raised in regard to the nonpayment of the lease rentals. There is clearly a debt due and payable.

6. In the circumstances, the company petition for winding is admitted and is made returnable on 21st January, 2010.

7. The petitioner to advertise the petition in two local newspapers viz. Free Press Journal, Navshakti and Maharashtra Government Gazette. The petitioner to deposit Rs. 10,000/- with the Prothonotary and Senior Master towards the publication charges, within a period of three weeks with intimation to the Company Registrar failing which the petition shall stand dismissed for non-prosecution.