(2013) 03 CAL CK 0083

In the Calcutta High Court

Case No : A.P.O. No. 457 of 2012, C.P. No. 560 of 2011

Maheshwari Ispat Ltd. APPELLANT

Vs

TATA Capital Financial Services Ltd. RESPONDENT

Date of Decision : 13-03-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Companies Act, 1956 — Section 433(e), 434(1)(a), 439, 439(1)(b), 443
Contract Act, 1872 — Section 128

Citation : (2013) 179 CompCas 15 : (2013) 4 CompLJ 167

Hon'ble Judges : Mrinal Kanti Chaudhuri, J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Abhrajit Mitra, Jishnu Chowdhury, Ms. Rajasree Kajaria and Soumabha Ghose, for the Appellant;Tilak Bose, Ms. Manju Bhutoria and Souvik Chowdhury, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Maheshwary Ispat Ltd., a company registered under the provisions of the Companies Act 1956, was in a precarious financial condition. They could not repay their dues to their creditors resulting in litigations at the instance of the creditors. Maheshwari however, claimed, they had sixteen secured creditors. However, only one secured creditor was pressing for winding up of the company, others were in favour of restructuring. Tata Capital Finance Service Ltd., helped the company in difficulties. They extended a short-term composite financial assistance to the extent of Rs. 5 crores approximately. In terms of working capital demand loan agreement dated October 5, 2009, Tata altogether sanctioned a sum of Rs. 5 crores as working capital. The directors being Ajit Kumar Mundra and Bhagwani Devi Mundra guaranteed the said loan. The loan was partly secured through pledge of a fixed deposit receipt for Rs. 75 lakhs with HDFC Bank. Maheshwari permitted Tata Capital to encash the said fixed deposit that would clear the dues to the extent of Rs. 92.54 lakhs towards part satisfaction. Maheshwari confirmed the balance from time to time and assured tax deducted at source certificates to be issued in due course. After taking into account, the sums paid from time to time a sum of Rs. 2,27,57,975 became due and payable as would appear from the confirmation of the accounts signed by Maheshwari dated July 14, 2011. The parties agreed to have contractual interest at the rate of 15.5 per cent, per annum. Adding interest as on the said date to the principal, a sum of Rs. 4,12,98,703.81 became due and payable when Tata filed the petition for winding up as against Maheshwari. Tata also initiated parallel proceedings before the Bombay High Court under the provisions of section 9 of the Arbitration and Conciliation Act, 1996 and obtained an order restraining disposal of assets by Maheshwari. The directors of Maheshwari being Ajit and Bhagwani filed affidavit disclosing their assets and worth. They assured, they would not deal with their assets unless the dues of Tata would be cleared off. Maheshwari contested the winding up proceeding. According to them, Tata being an unsecured creditor was successful in getting their claim secured through the Bombay proceeding. They were pursuing their remedy in arbitration. Hence, this winding up petition should not be allowed and the company court should not exercise discretion in favour of Tata admitting the winding up petition.

2. A group of winding up petitions came up for hearing before the learned company judge. The group had a common issue as to whether the secured creditors could file the petition for winding up and if so, what would be the role of the company court in the matter of admission of the winding up proceeding ? The learned single judge heard learned counsel for the parties in those proceedings. We were, also told, subsequently most of the petitions were withdrawn and/or not pressed barring two or three. Two judgments were delivered on the same day being October 12, 2012 (In Re: Maheshwary Ispat Limited and Tata Capital Financial Services Limited, one being the decision in the present case and the other in the matter of In Re: Eastern Spinning Mills and Industries Limited and Kotak Mahindra Bank Limited,). In the case of In Re: Eastern Spinning Mills and Industries Limited and Kotak Mahindra Bank Limited, the learned judge dismissed the winding up petition whereas in the case of In Re: Maheshwary Ispat Limited and Tata Capital Financial Services Limited, his Lordship admitted the same. In both cases, the aggrieved parties approached us in appeal. We" disposed of the appeal by the In Re: Eastern Spinning Mills and Industries Limited and Kotak Mahindra Bank Limited, where we remanded the issue back to his Lordship to decide the issue of admission on merits in the light of the observations made by us in the said decision. The present appeal would relate to the other decision in the case of In Re: Maheshwary Ispat Limited and Tata Capital Financial Services Limited,

Judgment analysis

3. The learned single judge held, company was unable to pay its debts, hence, u/s 433(e) the company was liable to be wound up and the winding up petition should be admitted and be given a representative character giving opportunity to all and sundry, either to support or oppose the prayer for winding up. His

Lordship held, the right of the secured creditor to present a winding up petition was unfettered by the fact that the creditor would enjoy security that would be inadequate to meet the claim. His Lordship also held, the balance sheet was unimpressive, in any event, before making an order of admission of the winding up proceeding the court would have to assess whether the company was solvent and its net worth was positive. His Lordship considered the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 and observed, the sickness of an industrial company was a much worse financial position than its commercial insolvency. His Lordship discussed the precedents and the law on the subject particularly, section 434(1)(a) of the said Act 1956 and held (page 130 of 175 Comp Cas): "If a debt is discharged by causing a third party to liquidate the claim, there is no claim to be carried forward for the court to assess the possible commercial insolvency of the company. But if security were caused to be furnished by another, it would not be unreasonable for the petitioner to insist that such fact is not to be taken into account to assess the commercial insolvency of the company".

4. The learned judge ultimately held, there was no dispute to the claim of the petitioning-creditor that was based on dishonored cheques. The company did not reply to the statutory notice. Hence, the claim was an ascertained sum and the order of admission was an obvious consequence, His Lordship admitted the petition together with cost of Rs. 51,000.

Contentions

5. Mr. Jishnu Chowdhury, learned counsel appearing for Maheshwari contended as follows:

(i) Even if the claim was a crystallised one, the dominant approach of the petitioning-creditor would automatically resist an order of admission of the winding up proceeding.

(ii) The petitioner Tata Capital already pursued their remedy before the arbitration court at Bombay. They obtained appropriate protection from the Bombay High Court. The appellant accepted such position hence, subsequent proceeding on the self-same issue was nothing but an abuse of process.

6. To support his contention Mr. Chowdhury relied on four decisions:

(i) Manipal Finance Corporation Ltd. Vs. CRC Carrier Ltd.,

(ii) Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another,

(iii) State Trading Corporation of India Ltd. Vs. Punjab Tanneries Ltd.,

(iv) Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders,

7. Mr. Tilak Bose, learned senior counsel appearing for Tata focused on the confirmation of the accounts appearing at pages 109-111 of the paper book. Mr.

Bose also referred to the statutory notice of demand that was not replied to. Hence, the presumption of inability to pay, was established. He referred to the balance-sheet and the affidavit of assets signed by Mundra referred to above, to show, securities were insufficient. The properties mentioned by the deponents in their affidavits were all charged with the secured creditors. Hence, the guarantors'' properties, even if taken into account, would be insufficient to meet the claim of the appellant. Mr. Bose would refer to section 128 of the Indian Contract Act, 1872 and the decision in the case of Ravi Cement Product Limited Vs. Kankani Construction Pvt. Ltd.,

8. Distinguishing the cases cited at the bar Mr. Bose would say, none of them would be applicable in view of factual difference. He prayed for dismissal of the appeal.

9. Mr. Jishnu Chowdhury, learned counsel appearing for the appellant while giving reply would contend, to decide a petition for winding up particularly, at the pre-admission stage, the company court would only venture to find out whether the dispute raised by the company was bona fide. The bona fide dispute would not only relate to the claim but also its payability and the surrounding circumstances. Offer to pay off the dues through reasonable instalments would successfully resist admission of a winding up proceeding. He referred to the decision in the case of SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., The petitioning-creditor was satisfied with the worth of the company and on being satisfied about the worth, they extended financial support. There was no major change in the financial status and the structure of the company hence, Tata should remain satisfied about the intention of the company to pay off the dues and should not be permitted to raise the issue of commercial insolvency or inability to pay. He contended, security given by persons other than the borrower was not unknown in the commercial world. It got the legal sanctity too.

Our view

10. In the case of State Trading Corporation of India Ltd. Vs. Punjab Tanneries Ltd., , the Punjab and Haryana High Court followed the apex court observation to the extent that the fact that the company was unable to pay the debts, would not necessarily entitle the court to pass an order of winding up. Inability to pay could not be the sole factor for admission. The learned judge declined to admit the petition on the ground of pendency of a civil suit on the self-same cause. However, it was not clear whether the decision was rendered before or after the admission of the winding up proceeding. In the case of Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, the apex court considered the precedents on the issue and relied upon the age old decision in the case of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., as also the decision in the case of Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, observed, the machinery for winding up should not be allowed to utilise merely as a means for realising its debts due from a company. This decision was subsequently considered in the

case of Manipal Finance Corporation Ltd. Vs. CRC Carrier Ltd., The learned judge held, the pressure tactics adopted by the petitioning creditor was nothing but a "sheer abuse of process of law." However, in the said case the learned judge also expressed doubt about the payability of the claim. In the case of Ravi Cement Product Limited Vs. Kankani Construction Pvt. Ltd., the Division Bench, in which one of us (Ashim Kumar Banerjee J.) was a party, held as follows (page 15 of 179 Comp Cas):

On a combined reading of all the three decisions referred to and discussed above, our understanding of the law is, a winding up petition should not be received when court is satisfied that the dispute raised by the company is bona fide and there is every likelihood that such claim could be effectively resisted by the company. Mere pendency of a civil suit on the self-same cause of action, in our view, would not ipso facto make a winding up petition not maintainable. In this regard we would refer to a decision in the case of Central Bank of India Vs. Sukhani Mining and Engineering Industries Pvt. Ltd. and Others, . The learned single judge of the Parna High Court observed, there is no such provision, the reason being that a winding up proceeding is not merely for the benefit of the petitioner but of all shareholders, creditors or contributories of the company. Therefore, winding up proceedings could not be stayed merely because the creditor has filed a suit against the company.

11. In Kotak Mahindra Bank Ltd. Vs. Eastern Spinning Mills and Industries Ltd., , we discussed the role of the company court in a case of the like nature. We discussed the law on the subject as cited at the bar. We held as follows (pages 25, 26 and 27):

Neglect to pay is a fiction that would depend upon the notice to be served u/s 434(1)(a) that would permit the creditor to claim deemed insolvency as a fiction. However, that would not take away the creditor''s right to claim, the company is also commercially insolvent or otherwise unable to pay its debt. If we give a close look to section 433(e) and (f) we would find, the company may be wound up if it is unable to pay its debt and the court is of the opinion, it is just and equitable that it should be wound up. These two provisions could be invoked by the creditor as we find from section 439. Section 439(1)(b) would permit any creditor to maintain the winding up petition. Sub-section (2) would also include a secured creditor as a creditor within the meaning of sub-section (1)(b). Section 434(1)(a) would give right to a creditor by assignment or otherwise having a claim more than Rs. 500 to serve the notice of remand and if the demand is not satisfied he would be entitled to claim deemed insolvency as per sub-section (2). From the analysis as above, we would find as follows:

(i) A creditor could maintain the winding up petition.

(ii) A secured creditor is also creditor to maintain winding up petition.

(iii) A creditor should have the claim for Rs. 500 and above.

(iv) He would serve the notice of demand, that demand, if unattended and/or unsatisfied, would permit the creditor to claim deemed insolvency.

(v) The creditor would maintain the winding up petition on the ground of inability to pay.

(vi) He would have to prove, it is otherwise just and equitable that the company should be wound up...

A creditor who has unpaid dues could only be reasonably satisfied if company has the means to pay. When the creditor serves the notice upon the company asking them to pay off the dues the company has option either to pay off or dispute the same. Even if the company has means to pay and does not pay without any reasonable cause it would be liable to be wound up. However, this question may not be relevant here as the record shows, the company was involved in circumstances due to its precarious financial condition. In our view, his Lordship should have admitted the winding up petition and directed advertisement of notice making the said proceeding a representative action....

If we go by his Lordship''s views per se on section 434(1)(a) we might agree with the ultimate result. However, the right of a creditor, secured or unsecured, to maintain the winding up petition would lie both u/s 434(1)(a) as well as section 433(e) and (f). Mr. Mookherjee contended, it was not argued. The learned judge however mentioned about the other aspect particularly the issue of commercial insolvency and such recording unless confronted before his Lordship, must be taken as sacrosanct.

We thus conclude, the petition by a creditor would be maintainable on both counts. Once the creditor established his right to claim the amount more than Rs. 500 the onus would shift on the company to rebut such claim by raising bona fide dispute. Once the bona fide dispute is raised it would weaken the chance to have admission of the winding up petition, otherwise admission is an obvious consequence.

Even if we accept the view of his Lordship on the interpretation of section 434(1)(a) we would not be in a position to agree with the ultimate finding as we find enough material to hold, the petition was maintainable in terms of section 433(e) and (f) read with section 439(1)(b) and (2).

12. In the case of Kotak Mahindra Bank Ltd. Vs. Eastern Spinning Mills and Industries Ltd., we specifically asked learned counsel as to whether they would be in a position to pay off the dues in a phased manner. In short, we invited proposal for repayment. Learned counsel could not apprise us on the issue, possibly in absence of appropriate instruction that would very much affect a positive decision of the court in favour of the company. In the present case in course of hearing we asked Mr. Chowdhury as to whether he would be in a position to make any commitment as to the repayment of the dues. He sought accommodation. On the next date of hearing, he gave a proposal of restructuring

of the debt that would take 5-6 years time to pay off the dues of the petitioner. We did not accept the same. Mr. Chowdhury again came back to court and ultimately agreed to pay off the dues at a monthly instalment of Rs. 10 lakhs per month. He also agreed for appropriate rescheduling after the end of one year so that at the end of the day the dues could be cleared off within a period little more than three years time. Mr. Bose did not seriously dispute the proposal for restructuring. He would contend, the proposal must have a backup by adequate security. He would not like to be content with the affidavit of Mundras as submitted before the Bombay High Court. He would want Maheshwari to sign post dated cheques to be countersigned by the bankers assuring payment on the dates mentioned therein. In short, he would require a complete assurance for repayment so as to say, he wanted to be a secured creditor being adequately protected.

13. Winding up is a discretionary remedy. The court has a wide discretion. Even if a claim is an admitted one, the order of admission is not a matter of course. The court would still retain its discretion u/s 443 of the said Act of 1956 that would empower the court to pass appropriate order that would be just in the facts and circumstances of the case. Coming back to the present scenario, we do not find any dispute to the ascertained/claim of the creditor. The company also could not make any positive effort on that score. However, the court should use its discretion judiciously. The order of winding up is virtually a death nail on the coffin of the company which was otherwise in a precarious condition. Before sending it to liquidation, the court would still try to find out the scope of revival, if any. After the passing of judgment and the order impugned, Maheshwari approached us by filing the appeal. We did not stay the operation of the order and directed expeditious hearing of the appeal. Tata advertised the notice of the petition in terms of the direction of his Lordship. The matter appeared on the returnable date when three creditors appeared to support the winding up proceedings. All three of them had independent winding up proceedings. Two cases were disposed of by relegating the parties to suit. The solitary one left, was negotiating with the company for a settlement as we were told by Mr. Chowdhury. Hence, even at the final stage the Tata would be the solitary pressing creditor in the field. This factor must be taken into account before putting the death nail.

14. We are inclined to give one more opportunity to Maheshwari to repay the dues of Tata. We do not intend to interfere with the order of admission. In any event, Maheshwari missed the bus. The petition already took a representative character. We intend to give them an opportunity to pay off the dues of Tata by instalments. So long as the instalments would be paid the winding up petition would remain permanently stayed.

15. We thus pass the following order:

(i) Maheshwari would pay the dues of Tata as quantified and adjudicated by his Lordship by the order and judgment impugned by monthly instalment of Rs. 10

lakhs per month for one year commencing from April 10, 2013 and thereafter on the 10th day of the succeeding month.

(ii) For the next financial year (April to March) Maheshwari would pay Rs. 12.5 lakhs per month on the date fixed as above.

(iii) In the third financial year Maheshwari would pay Rs. 15 lakhs per month until the entire dues are cleared off.

(iv) Upon payment of the aforesaid sums for three years in case any dues are still outstanding, that would be paid in four equal monthly instalments payable on the date fixed as above.

(v) The payment of interest at the contractual rate would be at the yearly rest and be paid on the reducing claim. However, the frozen amount as on the date of the foregoing order would be taken as a principal sum and would be cleared off first and the subsequent interest component would be paid thereafter.

(vi) So long as the instalments are paid off the winding up petition would remain permanently stayed. In default of payment of any one instalment this order would stand recalled and the parties would be at liberty to proceed before the learned company judge.

(vii) Other creditors who already indicated their support as per the advertisement, would be at liberty to proceed with their independent proceedings as referred to above and this order would not preclude them to do so.

16. The appeal is disposed of accordingly without any order as to cost. The learned judge awarded cost of Rs. 51,000 that is set aside.

17. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Mrinal Kanti Chaudhuri, J.

I agree.

