(2012) 10 AP CK 0030

In the Andhra Pradesh High Court

Case No : Company Petition No. 21 of 1999

MHB Bank Aktiengesellschaft, Hamburger Allee 14, 60486, Frankfurt AM Main, Germany — APPELLANT

Vs

M/s. Sanghi Polyesters Ltd., Office at Sanghi Nagar, Sanghi Nagar, R.R. District, Hyderabad — RESPONDENT

Date of Decision : 30-10-2012

Acts Referred:

Companies Act, 1956 — Section 10, 237, 391, 394, 395
Contract Act, 1872 — Section 141

Citation : (2013) 176 CompCas 305

Hon'ble Judges : B. Seshasayana Reddy, J

Bench : Single Bench

Judgement

B. Seshasayana Reddy

1. This company petition has been taken out u/s 439(1)(b) and Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956 seeking an order of winding up of the respondent company-M/s. Sanghi Polyesters Limited. The petitioner is a Bank engaged in banking business having its'' place of business at Bockenheimer, Landstrasse, 10, 60323, Frankfurt Am Main, Federal Republic of Germany and having a representative office situated at 107, Maker Chambers III, 223, Nariman Point, Mumbai 400 021 under the Laws of the Federal Republic of Germany. The respondent is a company incorporated under the Companies Act, 1956 having its registered office at 4.3.353, Bank Street, Hyderabad, Andhra Pradesh. The respondent company approached the petitioner bank for grant of loan for purchase of seven 32-pos, CW4t-1200/6 POY-HIGH SPEED TAKE UP MACHINES from M/s. Barmag A.G., Germany. The respondent-company granted loan to a tune of DM 16,062,144.00 (Deutsche Marks sixteen million sixty two thousand one hundred forty four only). The respondent-company executed loan documents and availed the loan. Part payments have been made by the respondent-company towards the loan amount. An aggregate outstanding due as on 30th August, 1997 was DM 16,149, 493.23. The petitioner bank

addressed series of letters demanding the respondent company to clear the outstanding due. The letters did not yield any fruitful result. Ultimately, the petitioner bank issued a notice u/s 434 of the Companies Act, 1956 making a demand from the respondent company to make payment as per the loan agreement. Despite receiving statutory notice, the respondent company neglected to make payment and thereby, the respondent company has become commercially insolvent warranting an order of it''s winding up.

2. Notice before admission came to be ordered on 22.2.1999. The respondents filed counter on 27.7.2000.

3. It is stated in the counter that the respondent company never neglected to pay the amount due to the petitioner bank. The respondent-company has vast assets. More than one thousand workers and hundreds of distributors would suffer if the prayer as sought for by the petitioner bank is agreed. The company petition is not maintainable since legal proceedings are required to be taken up in accordance with the law of Federal Republic of Germany, as per the Article 19.1 of the loan agreement. As per the loan agreement, the entire loan amount has been disbursed to M/s. Barmag (the machinery supplier) and if there is any non-payment, the petitioner bank as well as HERMS, which is an agency of Federal Republic of Germany, has to jointly initiate legal action against the respondent company. The entire loan amount was guaranteed by the Federal Republic of Germany under the head "Guarantee of the Federal Republic of Germany have tied buyers credit". The company petition has been filed by the petitioner bank as a coercive measure to pressurize the respondent company to repay the debt and the said attempt amounts to abuse of process of Court. The proceedings are required to be initiated by the petitioner bank as well as the Federal Republic of Germany represented by HERMES. Since statutory notice is issued only on behalf of the petitioner-bank, it is not in accordance with the provisions of Section 434 of the Companies Act, 1956. The machinery which has been acquired by the loan availed from the petitioner-bank has been found to be defective which substantially affected the functioning of the respondent-company.

4. The respondent also filed additional counter on 23.4.2001. It is stated in the additional counter that the petitioner-bank has to make a claim with the insurer, namely, HERMES as the entire loan amount has been insured on behalf of the respondent-company. The respondent-company paid 5.45% of the total loan as premium, which means that in case of any default, HERMES, an insurance agency has to pay the amount: The assets of the company are more than 500 crores with a turn over of Rs. 340 crores and therefore, it cannot be said that the respondent-company has no capacity to pay the loan amount. The insurance cover from HERMES is itself sufficient for the repayment of the entire loan. The company petition lacks merits and therefore, it is liable to be dismissed.

5. The petitioner bank filed rejoinder on 24-10-2000. It is stated in the rejoinder that the question as to who should institute action is a matter solely between Hermes and the petitioner bank and that there is no contractual relationship

between HERMES and the respondent company.

6. The Company Petition came to be admitted on 19.4.2001. The petitioner challenged the order of admission of the company petition by filing O.S.A. No. 13 of 2001. A Division Bench of this Court allowed the OSA and remanded the company petition for fresh adjudication on the issue of admission, by order dated 16-02-2006. Relevant portion of the order needs to be noted and it is thus:-

We have thoughtfully considered the respective arguments. In our opinion, the order under challenge is liable to be set aside because while directing admission of the company petition and its publication in terms of Rule 99 of the Rules, the learned Company Judge altogether overlooked the averments contained in the counter filed on behalf of the appellant, perusal of which shows that the appellant had disputed its liability to repay the debt claimed by the respondent. Whether or not the plea taken by the appellant has merit should have been decided by the learned Company Judge and a finding on the issue of debt and its nonpayment without reasonable cause ought to have been recorded before an order for admission of the company petition and its publication could be passed. In our view failure of the learned Company Judge to consider the counter filed by the appellant has resulted in manifest injustice.

7. On remand, the petitioner-bank filed C.A. No. 1487 of 2000 seeking permission to amend the name of the petitioner as MHB-Bank Aktiengesellschaft on the ground that the name of the petitioner-bank has been changed from ING BHF Bank Aktiengesellschaft to ING Bank Deutschland AG on 28.12.2004. The said application came to be ordered on 13-12-2010.

8. Heard learned counsel appearing for the petitioner and learned counsel appearing for the respondent and perused the material brought on record.

9. It is contended by the learned counsel appearing for the petitioner-bank that the respondent-company does not dispute of availing the loan of DM 16,062,144 (Deutsche Marks Sixteen Million Sixty Two thousand One Hundred and Forty Four only) for purchasing Poy-High Speed Take up machines from Barmag AG, Remscheid, Germany. Learned counsel would further contend that the respondent-company did not dispute of availing the loan from the petitioner-bank and also outstanding due covered under the loan account and as the liability is not in dispute, it''s inability to pay the undisputed debt suggests prima facie that the respondent-company has become commercially insolvent warranting admission of the company petition. It is also submitted by him that the respondent-company requested for re-schedulement of the loan even after receiving the statutory notice and that itself is sufficient to infer that the liability of the respondent-company to the petitioner-bank is undisputed. He would also submit that receipt of amount from the guarantor, namely, Euler Hermes does not absolve the liability of the respondent-company or does it take away the right of the petitioner-bank to initiate proceedings for realization of the amount due under the loan agreement. Learned counsel to buttress his submission that the

affairs of the respondent-company have been alarming refers the possession notice issued by the creditors of the respondent-company under the provisions of Sick Industrial Companies Act. In support of his contentions, learned counsel refers the decisions of Supreme Court in Union of India (UOI) Vs. Sri Sarada Mills Ltd., Oberai Forwarding Agency Vs. New India Assurance Co. Ltd. and Another, . In Union of India''s case (1 supra), the Supreme Court held that doctrine of subrogation does not confer any independent right on underwriters to maintain in their own name and without reference to the persons assured an action for damages to the thing insured. In Oberai Forwarding Agency''s case (2 supra), the Supreme Court held that the doctrine of subrogation confers upon the insurer the right to receive the benefit of such rights and remedies as the assured has against third parties in regard to the loss to the extent the insurer has indemnified the loss and made it good. The insurer is, therefore, entitled to exercise whatever rights the assured possesses to recover to that extent of compensation for the loss, but it must do so in the name of the assured.

10. Learned counsel appearing for the respondent-company contends that the company petition itself is not maintainable since the petitioner bank has received the payment from the guarantor, namely Euler Hermes. He would also submit that the respondent-company paid an amount of Rs. 2.20 crores in Indian currency towards the premium for insurance coverage from HERMES which is a pre-condition for the loan contract and as the petitioner-bank received the payment from the insurer, he is not entitled to initiate proceedings against the respondent-company basing on the loan agreement. In a way, his contention is that the petitioner-bank has been satisfied by the insurer in which case, the petitioner-bank cannot be permitted to have double benefit by initiating proceedings against the respondent-company for realization of the self-same debt. A further contention has been advanced that u/s 141 of the Indian Contract Act, it is the surety which has to initiate legal proceedings, if any against the respondent-company and not the petitioner-bank, which is a principal creditor in the given facts and circumstances.

11. The issue that calls for adjudication is:

Whether the petitioner-bank made out a case for admission of the company petition seeking an order for winding up of the respondent-company?

12. It is well settled that: a winding up petition is not a legitimate means of seeking to enforce payment of the debt, which is disputed by the company. The procedure u/s 433 of the Companies Act is summary. When the company produces prima facie proof of facts on which the defence depends which is probable and there is likelihood to succeed in point of law, it cannot be said that the company has neglected to pay the amount within the meaning of Sections 434(1)(a) of the Companies Act. Bona fide dispute implies substantial ground for the dispute raised. Where the debt is disputed, the company court should not proceed further unless it comes to the conclusion that the dispute in regard to the debt is not based on either tenable defence or not a bona fide denial of the

debt. In the summary procedure, which the company court must follow, if the court is satisfied, prima facie, that the defence raised in the circumstances of the case is bona fide and is likely to succeed in a civil court that would constitute sufficient reason for the court to reject the petition relegating parties to the civil court.

13. The availment of loan from the petitioner-bank is not in dispute. With the loan provided by the petitioner-bank, the respondent-company purchased the machinery. Of course, it is the contention of the respondent company that machinery supplied by Barmag, Germany is defective and thereby, the entire production activity in the respondent-company has come to a halt leading to substantial loss. It appears that the respondent-company initiated certain proceedings against the supplier. The petitioner bank herein is no way concerned with the proceedings initiated by the respondent-company against the supplier i.e. Barmag, Germany. The respondent-company admitted its liability on receipt of a statutory notice issued u/s 434 of the Companies Act and requested for reschedulement of loan. Once the respondent-company made a request for reschedulement of its liability, it cannot be said that the liability has been disputed by the respondent-company. Rather, it can be said that the respondent-company in unequivocal terms admitted of its liability to the petitioner-bank. It has been the plea of the respondent-company that the petitioner-bank waited for about one year two months after issuance of statutory notice and that itself is sufficient to infer an assurance as to reschedulement of the loan. I do not see any substance in his contention since no material has been placed before this court by the respondent-company that the petitioner-bank withdrew the statutory notice issued under the provisions of the Indian Companies Act.

14. The respondent-company by referring Article 11 of the loan agreement contended that the petitioner-bank has to pursue its remedy against the guarantor and indeed it pursued its remedy with the guarantor and realised the insured amount and therefore, no cause of action subsists against the respondent-company for realization of the amount due under the loan agreement. Article (11) of the loan agreement reads as hereunder:-

GUARANTEE OF THE FEDERAL REPUBLIC OF GERMANY FOR TIED BUYERS CREDITS

The Lender shall apply for cover for its claims arising from Loan contract by the Federal Republic of Germany, represented by HERMES kreditversicherung AG and any amount of the Loan made available shall be on the basis of the terms and conditions governing the guarantee issued by the federal Republic of Germany in favour of the Lender.

A reading of the above-referred Article indicates that it is the lender, i.e., the petitioner-bank, which has to apply for cover for its claims arising from the loan contract. The respondent-company cannot derive any benefit of the agreement which the petitioner-bank has with the Federal Republic of Germany represented by Hermes kreditversicherung AG. Even assuming that the petitioner-bank received the amount by virtue of the contract of guarantee, it does not absolve the respondent-company from it''s liability to pay the amount due to the petitioner-bank.

15. The contention of the respondent-company that under Article 19.3 of the Loan Agreement, the place of jurisdiction for both the parties is Frankfurt, Federal Republic of Germany and therefore, initiation of proceedings in Indian Court is contrary to the terms of the Contract. The contention of the respondent-company can be repelled by referring Section 10 of the Indian Companies Act, 1956 reads as hereunder:-

Jurisdiction of Courts.

10. (1) The Court having jurisdiction under this Act shall be-

(a) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2); and

(b) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district.

(2) The central Government may, by notification in the Official Gazette and subject to such restrictions, limitations and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction conferred by this Act upon the Court, not being the jurisdiction conferred-

(a) in respect of companies generally, by sections 237, 391, 394, 395 and 397 to 407, both inclusive;

(b) in respect of companies with a paid-up share capital of not less than one lakh rupees, by Part VII (sections 425 to 560) and the other provisions of this Act relating to the winding up of companies.

(3) For the purposes of jurisdiction to wind up companies, the expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

16. Indisputably, the respondent-company has its registered office within the jurisdiction of this Court. Therefore, this Court is competent to entertain the petition for winding up of the respondent-company. The material brought on record clearly established that the respondent-company neglected to pay undisputed liability and thereby, it has become prima facie, commercially insolvent warranting admission of the company petition. Accordingly, the Company Petition is admitted. The petitioner-bank shall advertise the company petition in all editions of THE HINDU english daily, EENADU telugu daily and also

in Andhra Pradesh Gazette.

Post the Company Petition on 30-11-2012 for hearing.