
(2013) 02 BOM CK 0075

In the Bombay High Court

Case No : Appeal (L) No's. 383 and 591 of 2012 in Company Petition No. 455 of 2010

M/s. Asian Power Controls Ltd.

APPELLANT

Vs

Mrs. Bubbles Goyal

RESPONDENT

Date of Decision : 18-02-2013

Acts Referred:

Companies Act, 1956 — Section 439, 439(1)(d), 528, 529, 529(1)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 3 ALLMR 379 : (2013) 4 BomCR 660 : (2013) 3 MhLj 811

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Vishwajit Sawant with Mr. Vaibhav Sugdare, Mr. S. Garud, Mr. Agasti Vibhute and Mr. Vivek Deo instructed by Jayakar and Partners and Mr. Anilkumar Singh instructed by Mr. Ashok Singh in Ch. Summons No. 1321 of 2012, for the Appellant; Vikram Deshmukh with Mr. Sushant Chavan instructed by . Ms. Kavita Brid, L.A. Satelkar for Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—These Appeals arise from orders of the learned Company Judge initially admitting a Company Petition for winding up on 12 March 2012 and allowing the Petition by an order dated 21 June 2012. The Respondent advanced a loan in the amount of Rs. 50 lakhs to the Appellant by a cheque dated 5 August 2008. A loan agreement was entered into between the company and the Respondent. A promissory note dated 5 August 2008 was executed by the Appellant agreeing to re-pay the loan of Rs. 50 lakhs together with interest. The company, as security for the re-payment of the loan, pledged the title deeds of certain immovable property belonging to it and situate at Pondicherry with the Respondent. A post-dated cheque in the amount of Rs. 50 lakhs was issued in favour of the Respondent. Six post-dated cheques each in the amount of Rs. 1,33,005/- towards interest payable on the loan were honoured on presentation. Interest on the loan was paid until October 2009. On 14 August 2009 the

company addressed a letter to the Respondent seeking an extension of time to repay the loan until 25 December 2009. A post-dated cheque dated 25 December 2009 in the amount of Rs. 50 lakhs was handed over. The cheque was deposited on 9 April 2010, but was returned by the bankers of the company on the ground that funds were insufficient.

2. A statutory notice of winding up was addressed to the company on 1 May 2010. In a reply dated 13 May 2010, the company contended that it was not liable to pay any amount inter alia on the ground that the Respondent did not hold a licence from the Reserve Bank and the documents were fabricated. A Petition for winding up was filed before the Company Court on the ground that the company was unable to pay its debts. An affidavit opposing admission was filed on 13 April 2011 contending that since the Respondent was a secured creditor, a Company Petition for winding up at its behest was not maintainable. This defence was rejected by the Company Judge, while relying upon a judgement of a Division Bench of this Court in *Bharat Overseas Bank Ltd. Vs. Shree Arcee Steels P. Ltd.*, . The Division Bench had held in that case, relying upon judgements of the Madras and Calcutta High Courts, that a Company Petition for winding up could not be dismissed at the stage of admission on the ground that the debt was secured. The Company Petition was admitted and advertised.

3. Prior to the filing of the petition for winding up, proceedings u/s 138 of the Negotiable Instruments Act, 1888 were instituted before the Court of the Metropolitan Magistrate at New Delhi. A criminal complaint was also filed by the Appellant. A reference to mediation was made before the Delhi High Court Mediation and Conciliation Centre. During the course of the mediation proceedings, a settlement was arrived at between the parties on 22 October 2011. The terms of settlement were as follows:-

A. That M/s. Asian Power Controls Ltd. undertakes to pay Mrs. Bubbles Goyal a sum of Rs. 60,00,000/- (Rupees sixty lacs) in full and final settlement of all liabilities, dues and claims under the Loan Agreement dated 5th August 2008 within 120 days of the date of signing of the present Settlement Deed by means of demand draft(s) drawn in favour of Mrs. Bubbles Goyal.

B. That at the time of signing of loan agreement dated 5th August 2008, as stated in para 2 of the Loan Agreement, the company had hypothecated the title papers of the land owned by the Company at Plot No. A-85 Mettupalayam Industrial Estate, P.I.P.D.I.C. Thattanchavady Revenue, Oulgaret Commune, Pondicherry in favour of Mrs. Bubbles Goyal. On receipt of the complete amount of Rs. 60,00,000/- (Rupees sixty lacs) within 120 days of the date of signing of the present Settlement Deed, Mrs. Bubbles Goyal undertakes to return the above-stated document to the company.

C. Mrs. Bubbles Goyal further undertakes to deposit the hypothecated title papers of the land owned by the Company at Plot No. A-85 Mettupalayam

Industrial Estate, P.I.P.D.I.C. Thattanchavady Revenue, Oulgaret Commune, Pondicherry with the Registrar General of the Hon''ble High Court of Delhi. That after such deposit, Mr. Munesh Kumar, the authorized representative of M/s. Asian Power Controls Ltd., may take into his possession the said document on superdari basis for a fixed time period by giving an undertaking in this regard. The said documents shall be deposited back again by Mr. Munesh Kumar with the Registrar General after the expiry of the fixed time period. In case M/s. Asian Power Controls Ltd. has made the payment of Rs. 60,00,000/- (Rupees sixty lacs) before the expiry of the fixed time period Mr. Munesh Kumar would not be required to deposit back the hypothecated title papers with Registrar General of the Hon''ble High Court of Delhi.

D. On receipt of the complete amount of Rs. 60,00,000/- (Rupees sixty lacs) by Mrs. Bubbles Goyal within 120 days of the signing of the present settlement deed, Mrs. Goyal further undertakes to withdraw Complaint Case No. 2034 of 2010 u/s. 138 NIA before the Court of Ld. M.M. Shri Dhiraj Mittal (Court room No. 509), District Courts, Saket, New Delhi and Company Petition No. 455 of 2010 u/s 433 of the Companies Act, 1956 before the Hon''ble High Court of Bombay. Mr. Monish Mukkar undertakes to withdraw the Criminal Misc. (Main) No. 1835 of 2011 filed before the Delhi High Court u/s. 482 CrPC and Mrs. Bubbles Goel undertakes to withdraw the counter affidavit filed by her on 22.10.2011 in the Criminal Misc. (Main) No. 1835 of 2011 before the Hon''ble High Court.

E. Further, Mrs. Bubbles Goyal and Mr. Munesh Kumar undertake to make a statement to the Hon''ble High Court of Delhi in accordance with the terms of the present settlement deed in Criminal Misc. (Main) No. 1835 of 2011 immediately on the signing of the present settlement deed.

9. By signing this Agreement the parties hereto state and admit that they have no further claims or demands against each other of any nature whatsoever and all the disputes and differences have been amicably settled by the Parties hereto through the process of Mediation.

10. That the parties declare before the Hon''ble Court that they are bound by this Settlement Agreement and undertake to abide by the terms and conditions set out in the agreement and not to dispute the same hereinafter in future.

4. In terms of the settlement between the parties, the Respondent admittedly deposited the title deeds of the immovable property at Pondicherry with the Registrar General of the Delhi High Court. The settlement was accepted by the Delhi High Court on 9 December 2011. In Cri.M.C. 1835/2011 and Cri. M.A. 6587/2011. The time for the Appellant to effect payment of a sum of Rs. 60,00,000/- to the Respondent expired on 21 February 2012. Admittedly, no payment was made. Even before the Court of the Metropolitan Magistrate (NI Act-02/South East New Delhi), a statement was made on 21 February 2012 that the amount as settled would be paid within a period of two months. This was

recorded in an order dated 30 March 2012 of the Metropolitan Magistrate, a copy of which has been placed on record. Admittedly, that statement was not complied with and no payment has been made. The Company Petition was admitted by the Company Judge on 12 March 2012. When the Company Petition came up for final disposal on 21 June 2012, a statement was made on behalf of the Respondent that the dues of the Respondent cannot be recovered by the sale of the land at Pondicherry. The learned Company Judge noted that it was also not the case of the company, in the affidavit filed at the stage of admission that the leased property was worth the claim of the Respondent as of date nor was it so contended on behalf of the Appellant even at the stage of final hearing. The learned Company Judge noted that the modus operandi of the company throughout has been to have the matter adjourned on one pretext or the other; there were several other Petitions against the company which were admitted and listed for final hearing and that the company is not doing any business and has stopped its operations for quite some time. Having come to the conclusion that the company is unable to pay its debts, the learned Company Judge allowed the Company Petition by ordering the winding up of the company and directing that the Official Liquidator shall stand appointed as Liquidator.

5. On behalf of the Appellant, it has been urged that: (i) the loan granted by the Respondent is secured by the creation of a mortgage by the deposit of title deeds; (ii) since the Respondent stands in the position of a secured creditor, it was necessary for the Respondent to state before the Company Court, when the Petition came up for final hearing, as to whether she wished to stand outside the proceedings for winding up and realise her security or, if the security was inadequate to cover the entirety of the claim, the extent of the claim which would be proved in the course of the winding up proceedings; (iii) such a disclosure was not made by the Respondent before the Company Judge when the Petition was heard and the Court has wrongly placed the burden on the Appellant to establish that the value of the property in respect of which a charge has been created is not sufficient to meet the claim of the Respondent; and (iv) the order for winding up suffers from an error apparent since it was the obligation of the Respondent to disclose whether she stood outside the proceedings for winding up or in the alternative to specify the extent to which her claim was not covered by the value of the security.

6. On the other hand, it has been urged on behalf of the Respondent that: (i) a Petition for winding up is maintainable at the behest of a creditor, whether secured or unsecured; (ii) a secured creditor has the option to stand outside the winding up proceedings and to realise or enforce the security held by him; (iii) in the present case, it was stated before the Company Judge that the claim of the secured creditor cannot be fully recovered by realising the security created in favour of the Respondent; (iv) It is before the Liquidator when claims are sought to be proved that the Respondent must disclose the extent to which there is a shortfall in the value of the security so as to enable the Respondent to prove the balance in the course of the winding up proceedings; (v) The Appellant has

consistently refused to abide by the re-payment schedule despite acknowledging its liability. Though a mediated settlement was arrived at, which was affirmed by the Delhi High Court, that has also been breached. The company, it has been urged, is clearly unable to pay its debts and the winding up order does not warrant interference in Appeal.

7. The claim of the Respondent is founded on a loan extended in the sum of Rs. 50 lakhs to the Appellant by a cheque dated 5 August 2008. The parties have executed a loan agreement. The Appellant has executed a promissory note agreeing to repay the loan together with interest as stipulated. The debt has been acknowledged by the company while seeking an extension of time on 14 August 2009 for the re-payment of the loan until 25 December 2009. A cheque in the amount of Rs. 50 lakhs issued by the Appellant has admittedly been returned by the bankers on the ground of insufficiency of funds. On 22 October 2011 a settlement was arrived at in the course of mediation proceedings before the Mediation and Conciliation Centre of the Delhi High Court. The mediated settlement has the imprimatur of an order of the Delhi High Court dated 9 December 2007. Under the terms of settlement, the Appellant agreed to pay an amount of Rs. 60,00,000/- to the Respondent within a period of 120 days. The Appellant has admittedly failed in complying with that obligation. The Respondent had fulfilled her obligation under the terms of the settlement to deposit the title deeds placed before the Delhi High Court. The time as prescribed in the settlement has expired. After the learned single Judge passed an order of winding up on 21 June 2012, the hearing of the Appeal was adjourned to 2 July 2012 in order to enable the parties to settle the dispute. On 25 June 2012 leave was granted by the Division Bench to amend the Memo of Appeal. On 5 October 2012 when the Appeal came up, the amendment was still to be carried out. An adjournment was sought on behalf of the Appellant to carry out the amendment. Noting that no amendment had been carried out despite the lapse of time, a final opportunity was granted by the Division Bench on 5 October 2012. On 1 November 2012 a statement was made on behalf of the Appellant that it was in a position to pay the dues of the Respondent, but that the Appellant needed to dispose of its property of which the title deeds were lying in deposit with the Registry of the Delhi High Court. A statement was made on behalf of the Appellant before the Court that the intending purchaser proposes to inspect the original title deeds and to enter into an agreement to purchase the property by paying 20% of the sale consideration and that as soon as a deposit on account of earnest is received, it shall be lodged with the Prothonotary & Senior Master. On this statement which was made on behalf of the Appellant, an ad-interim stay of the judgement of winding up was granted by the Division Bench until the next date of hearing. The settlement as envisaged by the Appellant in the statement before the Court on 1 November 2012 has not taken place. No payment has been received even on account of earnest money deposit. We would also record that during the course of the hearing, we had called upon the Appellant to disclose as to whether even at this stage, it has a bona fide offer to meet the outstanding

dues payable to the Respondent within a prescribed time schedule. The Appellant is not in a position to make any such statement before the Court. Though it has been stated before the Court that the Appellant has entered into a settlement with certain other creditors as reflected in the orders of the Division Bench dated 9 July 2012 and 1 November 2012 Appeal (L) No. 384 of 2012 and Appeal (L) No. 382 of 2012. in two other appeals, the Appellant has not been able to come out with any bona fide offer of settlement despite ample opportunities that were granted during the course of these proceedings. There is no dispute about the position before the Court that the Appellant does not carry on any business and that the factory of the Appellant at Pune is closed.

8. The submission in support of the Appeal is that as a secured creditor, it was the obligation of the Respondent to disclose before the Company Court, when the Petition for winding up came up for final hearing as to whether the Respondent chose to enforce her security by standing outside the winding up proceedings or, whether the Respondent wished to stand together with the general body of creditors for realisation of her dues. Now in considering the submission, it must be noted at the outset that a Petition for winding up can be maintained at the behest of a creditor, whether secured or unsecured. This is evident from the provisions of section 439(1)(d). Under sub-section (2) of section 439, among others, a secured creditor is to be deemed to be a creditor within the meaning of clause (b) of sub-section (1). This position has been enunciated in a judgement of the Company Judge of this Court in *Canfin Homes Ltd. Vs. Lloyds Steel Industries Ltd.*, . In a judgement of a Division Bench of the Madras High Court in *Karnatak Vegetable Oils and Refineries Ltd. Vs. Madras Industrial Investment Corporation Ltd. and Another*, . consisting of Rajamannar, C.J. & Rajagopala Ayyangar, J., it was held that it was well-established that a secured creditor is as much entitled as of right to file a petition for winding up as an unsecured creditor, The judgement of the Madras High Court is also authority for the proposition that the rule in bankruptcy that before a secured creditor can file a petition for insolvency he has to abandon his security or to value the security and aver that after giving credit to such value there would be a balance due and payable to him, does not apply in winding up. The Madras High Court held that the general rule is that a creditor who cannot get paid has a right to a winding up order, whether he be a secured or an unsecured creditor. However, this right of the creditor is always subject to the discretion of the Court and the Court may in an appropriate case refuse to make a winding up order, having regard to the wishes of a majority of the creditors. A similar view has been taken by a Division Bench of the Calcutta High Court in *Techno Metal India (P.) Ltd. Vs. Prem Nath Anand*, . In *Bharat Overseas Bank Ltd. v. Shree Arcee Steels P. Ltd.*, a Division Bench of this Court followed these well-settled principles by observing as follows:-

We are of the opinion that bearing in mind the clear provisions of the Companies Act and the principles which have been discussed in detail in the Madras High Court and the Calcutta High Court judgements above-cited, the rejection of the petition in this case at the stage of admission was not at all justified. The petition

was required to be admitted and advertised and it is at that stage that the Court could go into the question as to whether the security is sufficient or not and exercise its discretion to accept the petitioning creditor's claims and request for winding up or to reject the same on judicial consideration.

The judgement in Bharat Overseas Bank Ltd. does not lay down any principle to the contrary. In fact, the judgment of the Division Bench in Bharat Overseas Bank Ltd.'s case follows the consistent principle of law which has been laid down by the Madras and Calcutta High Courts as noted earlier.

9. Section 529(1) of the Companies Act, 1956, provides that in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to (a) debts provable; (b) the valuation of annuities and future and contingent liabilities; and (c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. Under sub-section (2) of section 529, all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of the section. Section 529A provides an overriding preferential priority to the dues of the workmen and to the debts due to secured creditors to the extent to which such debts rank *pari passu* under clause (c) of the proviso to sub-section (1) of section 529 with such dues. The rules of insolvency which are attracted to proceedings of winding up are *inter alia* those pertaining to the proof of debts. This is after the stage of the winding up order. This principle has been enunciated in a judgement of Mr. Justice M.N. Venkatachaliah (as the learned Chief Justice then was) speaking for a Division Bench of the Karnataka High Court in *Hegde and Golay Limited Vs. State Bank of India*, . The judgment of the Company Judge of this Court in *Canfin Homes Ltd. Vs. Lloyds Steel Industries Ltd.*, has also followed the principle that the scheme of the provisions relating to winding up, particularly those in sections 528 and 529 would indicate that the stage of proving a claim of a debt arises after an order of winding up is passed. In *Canffin Homes Ltd.*, this Court held as follows:-

15. The secured creditor who seeks to prove the whole of his debt in the course of the proceedings of winding up must before he can prove his debt relinquish his security for the benefit of the general body of the creditors. If he surrenders his security for the benefit of the general body of creditors, he may prove the whole of his debt. If the secured creditor has realised his security, he may prove for the balance due to him after deducting the net amount that has been realised. The stage for relinquishing security arises when a secured creditor seeks to prove the whole of his debt in the course of winding up. If, he elects to prove in the course of winding up the whole of the debt due and owing to him, he has to necessarily surrender his security for the benefit of the general body creditors.

Having regard to the position in law as consistently followed in the judgements of the Madras, Calcutta and Karnataka High Courts and as reiterated in the

judgement of the Company Court in Canfin Homes Ltd., it is not possible to accept the submission which was urged on behalf of the Appellant. The law does not impose an unreasonable condition of requiring a secured creditor to forsake his security before he asserts a right to urge that a company which is unable to pay its debts should be wound up. The Respondent has stated before the learned Company Judge, when the petition for winding up came up for hearing that it was not possible for the Respondent to recover her dues by the sale of the land in respect of which a security has been created in favour of the Respondent. The claim of the Respondent is still to be proved in the course of the winding up proceedings. A secured creditor who has a mortgage, charge or lien on the property of the company as security for her debt may either: (a) enforce the security and prove in the winding up for the balance of the debt after deducting the amount realised; or (b) surrender the security to the Liquidator and prove for the whole of the debt as an unsecured creditor; or (c) estimate the value of the property subject to her security, and prove for the balance of the debt after deducting the estimated value; or (d) rely on the security and not prove in the winding up proceedings. Pennington's Company Law (Fourth edition, page 762). A secured creditor has the option of relinquishing his security and/or proving the entirety of his debt in the course of winding up. If the secured creditor does so in the course of winding up proceedings, the security will enure for the benefit of the body of creditors. On the other hand, it is open to a secured creditor to prove in the course of winding up proceedings to the extent of his debt which has not been realised outside the proceedings for winding up by either accounting for the amount that has been so realised or by estimating the value of the property subject to security so as to enable him to prove in respect of the balance of the debt. On either view of the matter, that stage is still to arrive.

10. For these reasons, we are of the view that the learned Company Judge was not in error in initially admitting the Petition and thereafter making the Company Petition for winding up absolute. No case for interference in appeal is made out. The Appeals are accordingly dismissed.