
(2017) 01 BOM CK 0026

In the Bombay High Court

Case No : Appeal (L) No. 259 of 2016 in Company Petition No. 3 of 2015

Prime Broking Company (India) Ltd.

APPELLANT

Vs

National Securities Clearing Corporation Ltd.

RESPONDENT

Date of Decision : 17-01-2017

Acts Referred:

Companies Act, 1956 — Section 433, Section 434

Citation : (2017) 2 AIRBomR 284 : (2017) 3 ALLMR 879 : (2017) 2 BCR 665 :
(2017) 200 CompCas 540

Hon'ble Judges : Dr. Manjula Chellur, CJ. and M.S. Sonak, J.

Bench : Division Bench

Advocate : Mr. Zal Andhyarujina a/w. Mr. Nirav Mehta and Mr. Naushar Kohli i/b DSK Legal, for the Appellant; Mr. Viraj Tulzapurkar, Sr. Advocate a/w. Dr. Birendra Saraf, Mr. Sachin Chandarana, Mr. Pritvish Shetty i/b M/s. Manilal Kher Ambalal & Co, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Sonak, J. - Heard learned counsel for the parties at length. With their consent and at their request, we proceed to dispose of this Appeal finally.

2. The appellant (company) appeals the order dated 28 June 2016 made by the Company Judge admitting the petition for winding up of the company and ordering the advertisement thereof in accordance with the provisions of the Companies Act, 1956 (said Act) and the Companies (Court) Rules 1959 (said Rules).

3. There is no dispute that the company is indebted to the respondent (petitioning creditor) in an amount of at least Rs. 90.90 crores. The company however contends that as against such undisputed dues, the company has a claim against the petitioning creditor in an amount of Rs. 152.57 crores by way of damages on account of certain acts of omission and commission on the part of the petitioning creditor. The company contends that even before the receipt of statutory notice under section 434 of the said Act, the company had instituted

Suit (L) No. 939 of 2013, claiming the said amount of Rs. 152.57 crores. This according to the company constitutes a defence which is bona fide and one of substance, both in law as well as in facts. Therefore, the company urges that the petition seeking its winding up ought not to have been admitted and the impugned order, which does so, warrants interference.

4. Mr. Zal Andhyarujina, learned counsel for the company, in support of this appeal, submits the following:?

(I) Whilst there may be no dispute that the company is indebted to the petitioning creditor in an amount of Rs. 90.90 crores, the company, even before the receipt of statutory notice under section 434 of the said Act, had already instituted Suit (L) No. 939 of 2013 claiming an amount of Rs. 152.57 crores from the petitioning creditor for acts of omission and commission on its part, particularly in not selling the entire bulk of 20 lacs shares of Gitanjali Gems Limited (Gitanjali) up to 27 April 2013, on which date, freeze order was issued by the Economic Offences Wing (EOW) under section 102 of the Code of Criminal Procedure (Cr.P.C). The petitioning creditor was bound to sell such shares since, they had been pledged by the company to the petitioning creditor by way of security for the margins which the company was required to maintain with the petitioning creditor.

(II) In any case, in the meeting dated 14 March 2013, since the petitioning creditor agreed to sell all the pledged shares, including the Gitanjali shares and further, actually sold some such shares between 19 and 22 March 2013, there was no legal justification whatsoever for the petitioning creditor to suspend sales after 22 March 2013, by which date, hardly 2.97 lacs Gitanjali shares, from out of the total pledged 20 lacs Gitanjali shares came to be sold. There is accordingly, unlawful omission or in any case, gross illegality in the manner of sale of the pledged Gitanjali shares. For such acts of omission and commission, the petitioning creditor is liable to pay damages quantified at Rs. 152.57 crores to the company. The claim in the suit is therefore bona fide and a substantial one. In support of this ground, reliance was placed upon the decisions of the Supreme Court in *Vimal Chandra Grover v. Bank of India*, (2005) 5 SCC 122, *M/s. Sicpa India Private Ltd. v. M/s. Brushman (India) Ltd.*, (2013) 180 Company Cases 187 and *S.L. Ramaswamy Chetty & Anr. v. M.S.A.P.L. Palaniappa Chettiar*, AIR 1930 Madras 364.

(III) The claim in the suit instituted by the company, is in the nature of an "equitable set off" to the dues payable by the company to the petitioning creditor. In *re Portman Provincial Cinemas Ltd.*, 1999 (1) WLR 157 (Portman), the Court of Appeal (UK) has held that where, a company has an unresolved cross claim exceeding the amount of debt, the petition seeking its winding up has to be dismissed. The Company Judge in this case, has misconstrued the said decision and in any case, committed a gross error in preferring the minority view.

(IV) In the present case, de hors the provisions of section 176 of the Contract

Act dealing with pledges, the petitioning creditor, being a stock exchange was obliged to "close out" transactions expeditiously and consequently, was legally obliged to offload/sell the pledged Gitanjali shares as expeditiously as possible, particularly since, decision to this effect had been taken by the petitioning creditor in the meeting dated 14 March 2013. For the breach of such legal obligation, the petitioning creditor is answerable in damages. In support of such proposition, reliance was placed upon the decisions of the learned Single Judge of this Court in *Kritika Nagpal v. Geojit Financial Services Ltd.*, Arbitration Petition No. 47 of 2009 decided on 14 July 2016 and *Bonanza Commodities Brokers Pvt. Ltd. v. Mrs. Roshanara Bhinder*, (2015) 5 Bom. C.R. 393.

(V) The petitioning creditor has rendered itself liable in damages for suspending sales of Gitanjali shares from 25 March 2013 and upto 27 April 2013 by relying upon EOW's letter dated 23 March 2013, when in fact, such letter had no statutory force whatsoever and consequently, was not at all binding upon the petitioning creditor. Had the petitioning creditor disregarded EOW's letter dated 23 March 2013, as it was bound to, and proceeded with the sale of 20 lacs Gitanjali shares before 27 April 2013, there would possibly arise no debt payable by the company to the petitioning creditor.

5. Mainly for all the aforesaid reasons, it was submitted that the defence raised by the company was bona fide, one of substance, likely to succeed in point of law and backed by prima facie proof of the facts on which the defence depends. Therefore, relying upon the decision of the Supreme Court in *M/s. Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd.*, 1971 (3) SCC 632, it was submitted that the impugned order admitting the winding up petition, warrants interference.

6. Mr. Virag Tulzapurkar, learned Senior Advocate for the petitioning creditor, in defence of the impugned order has made the following submissions:

(I) That in this case there is no dispute whatsoever that the company is indebted to the petitioning creditor to the extent of at least Rs. 90.90 crores. In fact, this position has been expressly admitted by the company in several documents and on several occasions.

(II) The petitioning creditor is a stock exchange and the company was one of its authorised brokers. On account of several defaults committed by the company qua its own clients or traders, the petitioning creditor was not only constrained to terminate the company's broker-ship, but further, make good the dues payable by the company to its own clients or traders. In terms of the agreements with the company as also rules, regulations and bye-laws of the stock exchange which bind the company, the company is due and payable to the petitioning creditor an amount of at least Rs. 90.90 crores with regard to which there is not even any dispute raised by the company. Besides, there is ample material on record to the effect that the company is unable to pay its debts. In such a situation there is absolutely no error in the impugned order admitting the petition for winding up.

(III) In terms of section 176 of the Contract Act, there is no legal obligation upon a pledgee to sell the pledged goods and adjust the proceeds towards the underlying debt. The discretion in this regard is entirely with the pledgee and in the present case, such discretion has been exercised with utmost reasonableness. In support of this proposition, reliance was placed upon several decisions including *S.L. Ramaswamy Chetty (supra)*, *State Bank of India v. Smt. Neela Ashok Naik & Anr.*, AIR 2000 Bombay 151, amongst others;

(IV) In this case, there was no "agreement" between the petitioning creditor and the company in the matter of sale of the pledged Gitanjali shares. There is absolutely nothing in the minutes of the meeting dated 14 March 2013 to suggest the existence of any such "agreement" between the parties. In fact, this position was even conceded by learned counsel for the company before the Company Judge and such concession is recorded in the impugned order. In the absence of any such "agreement", the decision in the case *Vimal Chandra Grover (supra)* is distinguishable and was rightly distinguished by the Company Judge.

(V) Assuming without in any manner admitting that there was any obligation to sell the Gitanjali shares, such obligation, at the highest, might have arisen in June 2013 when the trades matured. The debt of at least Rs. 90.90 crores actually crystallised only on June 2013 and therefore, before the said date, there was no question of there being any obligation upon the petitioning creditor to offload or sell the pledged Gitanjali shares. By this date, admittedly the EOW's freeze order dated 27 April 2013 was in force.

(VI) Further, assuming without in any manner admitting that there was obligation to sell the pledged Gitanjali shares even before the trades matured in June 2013, the petitioning creditor has acted with utmost reasonableness in suspending the sale of Gitanjali shares from 25 March 2013 on which date the petitioning creditor received EOW's letter dated 23 March 2013 requiring it to refrain from dealing with the Gitanjali shares since, the criminal involvement of the company qua such Gitanjali shares was being investigated into. It was pointed out that in fact the petitioning creditor even objected to the letter dated 23 March 2013 and took up the matter with EOW. However, taking into consideration the respective status of the petitioning creditor as a stock exchange and the law enforcement agency like EOW, it was entirely reasonable to suspend further sales.

(VII) On 27 April 2013, the EOW issued a formal freeze order under section 102 of the Cr.P.C. The petitioning creditor challenged the order before this Court. In contrast, the company, which had virtually invited action from EOW, took no steps whatsoever to challenge either the EOW's letter dated 23 March 2013 or the freeze order dated 27 April 2013. This is indicative of the mala fides of the defence now raised by the company in order to thwart of an order for winding up of the company.

7. For all the aforesaid reasons, it was submitted that there is virtually no defence or dispute qua the admitted debt of Rs. 90.90 crores. There is ample

material on record which establishes the inability of the company to pay its debts. Assuming that a claim for damages, which is yet to be ascertained, can at all constitute a defence, in the facts of the present case, such a defence is mala fide, lacking in substance, untenable both, in facts as well as law and therefore applying the principles set out in Madhusudan Gordhandas (supra), the petition for winding up of the company was rightly admitted by the Company Court.

8. The rival contentions now fall for our determination.

9. The locus classicus as to the considerations relevant to the admission of a petition for winding up of a company on the ground of inability to pay debts, is the decision of the Hon''ble Supreme Court in Madhusudhan Gordhandas (supra). Therein, it is held that if the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company. But where the debt is undisputed the court will not act upon a defence that the company has ability to pay the debt but the company chooses not to pay that particular debt. Further, where there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of debt is disputed, the court will nevertheless make a winding up order without requiring the creditor to quantify the debt precisely. The principles upon which the court acts are "first" that the defence of the company is in good faith and one of substance, "secondly", the defence is likely to succeed in point of law and "thirdly", the company adduces prima facie proof of the facts on which the defence depends. In fact, the learned counsel for both the parties, very rightly placed reliance upon this formulation of law by the Hon''ble Supreme Court.

10. In this case, there is absolutely no dispute that the company is due and payable to the petitioning creditor an amount of at least Rs. 90.90 crores on account of various trades executed by the company on the platform of National Stock Exchange of India Limited. The company is primarily, a broker enlisted with the petitioning creditor, who has admittedly committed several defaults qua its clients or traders. Since, the company failed to make good such defaults to its clients or traders, the petitioning creditor, consistent with its terms of agreement with the company as also rules, regulations and bye-laws of the Stock Exchange, made good such defaulted amounts to the company's clients or traders. The petitioning creditor, is accordingly, entitled to recover such amounts already expended by it on account of the company, from the company. There is neither any dispute on this score nor is there any dispute that the company is due and payable an amount of Rs. 90.90 crores to the petitioning creditor.

11. In fact, the company, in its letter dated 31 July 2013 has expressly admitted that the amount of Rs. 90.90 crores is due and payable by it to the petitioning creditor. So also, in the particulars of claim set out by the company in its Suit (L) No. 939 of 2013, the company has admitted that it is due and payable such amount to the petitioning creditor. In the impugned order, learned Company Judge, at paragraph 14, has also recorded the following:

"14.....Even before me, Mr. Andhyarujina, learned counsel appearing on behalf of the Respondent Company, very fairly conceded that this amount of Rs. 90.90 Crores is due and payable by the Respondent Company to the Petitioner....."

12. The material on record also establishes inability of the company to pay the admitted dues of Rs. 90.90 crores to the petitioning creditor. In fact, this Court, in order dated 2 September 2014 in Company Application (L) No. 383 of 2014 in Company Petition No. 3 of 2015 has recorded the statement made on behalf of the company that it has shut down its business due to the orders of NACL and BSE disconnecting their terminal and declaring them as defaulters. The order also records that the company has no assets whatsoever except their trade receivables. For purpose of convenience, the order dated 2 September 2014, referred to above, is transcribed below:

"1. The learned Advocate appearing for the Respondent Company states that the Portfolio Management Services, a division of the Respondent is transferred to Religare. However, no part of the sale proceeds are left with the Respondent Company. It is further stated that the Respondent Company has shut down its business due to the orders of NACL and BSE disconnecting their terminals and declaring them as defaulters. The Respondent Company has no assets whatsoever except trade receivables.

2. The Respondent Company shall maintain status quo as of today upto 4th September, 2014 in respect of its assets including receivables. In view thereof, no further orders are required to be passed on the above Application.

3. Place the above Petition as well as Application for hearing on 4th September, 2014."

[Emphasis supplied]

13. The defence raised by the company, therefore, does not directly concern its liability to pay the amount of Rs. 90.90 crores to the petitioning creditor. However, it is the case of the company that it has already instituted Suit (L) No. 939 of 2013 against the petitioning creditor seeking damages of Rs. 152.57 crores and since the company has a very good chance of succeeding in such suit, the same ought to be regarded as an "equitable set off" or at least in the nature of an "equitable set off" as against the liability of Rs. 90.90 crores owed by the company to the petitioning creditor. Further, upon such basis the company contends that its defence is bona fide, substantial, likely to succeed in point of law and is backed by documents, which prima facie prove the merits of such defence. Therefore, the company urges that the petition was liable to be dismissed.

14. At the outset, we must say that we are doubtful whether the institution of a suit for damages by the company when in fact, the debt claimed by the petitioning creditor is not at all disputed by the such company, can at all

constitute a valid defence to a petition seeking winding up of the company. Normally, in a petition seeking winding up on the ground of inability to pay debts, the dispute is with regard to the very liability for the payment of such debt. The question which normally arises is whether such dispute, to the very existence of the debt or the liability to pay the debt, is bona fide and one of substance. In this case, as we have noted earlier, there is no dispute whatsoever with regard to the debt of Rs. 90.90 crores which is due and payable by the company to the petitioning creditor. However, even if we were to proceed on the basis that the institution of a suit for damages against the petitioning creditor, in a given case, constitutes valid defence, it is necessary for the company to further establish that such defence is bona fide, one of substance, likely to succeed in point of law and finally backed by prima facie proof of the facts upon which such defence depends. In the present case, we agree with the learned Company Judge that none of these matters have been established by the company and therefore, there is really no warrant to interfere with the impugned order.

15. In *Portman* (supra), the majority opinion does not lay down, as a broad or absolute proposition that a petition for winding up of a company has to be dismissed, no sooner a cross claim is presented by such company irrespective of whether such cross claim is with substance or not. All that the majority opinion holds, is that the case set out by the company which was sought to be wound up, was not so vague and the likelihood of success so slight, so as to hold that there was no substance whatsoever in the cross claim. The majority opinion also observes that notwithstanding certain imperfections in the affidavit of Mr. Hymanson and Mr. Waller, it was too premature to hold that Mr. Walmsley had no ostensible authority in the matter. Lord Denning M.R. speaking for the minority, has however, held that only where there is any genuine cross claim with substance that a petition for winding up can be rejected. He relied upon in *re Welsh Brick Industries Ltd.*, [1946] 2 ALL E.R. 197, where it was held that in spite of fact that unconditional leave to defend had been granted in the King's Bench action, the Company Court could look into the matter and if it finds that there was no substance in the defence, could proceed to entertain the petition for winding up of the company. In the facts of the case, Lord Denning M.R. found that there was no substance in the defence raised by the company. Incidentally, even the majority approves the dictum, In *re Welsh Brick Industries Ltd.* Therefore, *Portman* (supra) is not an authority for proposition that no sooner some cross claim is raised by the company against the petitioning creditor, the petition for winding up of the company has to be necessarily dismissed without even prima facie examining whether the cross claim is genuine and one of substance.

16. The legal position as to relationship between a pledgor and the pledgee arising out of section 176 of the Contract Act has been the subject matter of several decisions including, but not restricted to *S.L. Ramaswamy Chetty* (supra) and *State Bank of India v. Neela A. Naik* (supra) etc. All these decisions hold that the pledgor cannot compel the pledgee to exercise power of sale of the pledged

goods in order to discharge any debt or liability which may have crystalised. The pledgor's right, in such circumstances extends only to the following:

"(i) in case the Pledgee exercises the power of sale, to insist that it should be honestly and properly done and the sale proceeds applied to the debt;

(ii) in case the pledgee does not exercise the power of sale, then the Pledgor can redeem the pledge on payment of the debt or such part of it that has remained unpaid; and

(iii) in case the sale was improperly exercised, to get damages caused thereby."

17. The decision in the case of Vimal Chandra Grover (supra) upon which considerable reliance was placed by Mr. Andhyarujina, makes no dent to the aforesaid legal position. In fact, the Hon'ble Supreme Court after specific reference to the decision in the case of S.L. Ramaswamy Chetty (supra) as also several other decisions of various courts at paragraph 23 had held that it is not necessary to go into such legal niceties in view of the clear provisions of law. However, the Hon'ble Supreme Court did observe that in the mass of judicial pronouncements the real issue in the case must not be forgotten. It has proceeded to thereafter elaborate upon facts and hold that the real issue was that the pledgee bank in the said case, had specifically agreed to sell the pledged shares (500 shares of Castrol Limited) and thereafter, in breach of such agreement, failed to sell the same. It is in these circumstances, that the Hon'ble Supreme Court recorded the conclusion that there was "deficiency in service" on the part of the pledgee bank.

18. Therefore, the crucial factor in the case of Vimal Chandra Grover (supra) was the existence of agreement between the pledgee bank and the borrower, in terms of which the pledgee bank had agreed to sell the pledged shares but thereafter committed a breach. In paragraph 22, the Hon'ble Supreme Court has recorded that the agreement between the parties was clearly spelt out from the correspondence exchanged between the parties. Again, in paragraph 23, at least at four different places, the Hon'ble Supreme Court has emphasized upon the agreement between the parties. Therefore, unless the company pleads and establishes the existence of any similar agreement in the present case, there is no question of seeking sustenance from the decision in the case of Vimal Chandra Grover (supra).

19. There is no material on record to establish even the prima facie existence of any agreement between the company and the petitioning creditor in the matter of sale of the pledged Gitanjali sharers. The minutes of the meeting dated 14 March 2013 do not even remotely spell out any such agreement. Mr. Andhyarujina, was not at all clear as to whether it is the case of the company that there exists any such agreement between the parties. This is quite understandable, since, in paragraph 20 of the impugned order, the learned Company Judge has recorded the following :

"20.In fact, Mr. Andhyarujina very fairly conceded that there was no agreement between the parties that the Petitioner would sell 20,00,000 shares of Gitanjali..... ."

20. In this case, even if we were to proceed on the basis that there was some obligation upon the petitioning creditor to sell the pledged Gitanjali shares and to adjust the proceeds against the dues payable by the company, such obligation, at the highest, would arise only after the trades matured or debt was actually crystallised some time in June 2013. Admittedly, the trades matured or the debt was crystallised in the present case only in June 2013. By this date, there was already a freeze order made by EOW under section 102 of Cr.P.C. disabling the petitioning creditor from dealing with the pledged Gitanjali shares.

21. There was no legal obligation whatsoever upon the petitioning creditor to sell the pledged shares in order to maintain the margins. Again, even if maximum latitude is extended to the company, we find no un-reasonability in the petitioning creditor suspending sales from 25 March 2013, no sooner, they were served with EOW's letter dated 23 March 2013, requiring them not to deal with the Gitanjali shares since EOW was examining complaints made by certain clients of the company in relation to these very shares.

22. There is no dispute that the petitioning creditor did sell almost 2,97,000 Gitanjali shares between 19 March 2013 and 22 March 2013. The next two days i.e. 23 March 2013 and 24 March 2013, were weekend holidays, therefore, no trade was possible at the stock exchange. On 25 March 2013, the petitioning creditor were served with EOW's letter dated 23 March 2013 requiring them to refrain from dealing with Gitanjali shares, as the EOW was examining complaints made by certain clients of the company. The question in such a situation is not really as to whether such letter dated 23 March 2013 had binding force or not. The question is whether the compliance by the petitioning creditor of such direction from the EOW, was a reasonable or not. We completely agree with the reasoning of the learned Single Judge that the petitioning creditor acted quite reasonably in the matter, as otherwise, the possibility of the petitioning creditor or it's directors/officers being proceeded with criminally, could not have been ruled out. There are absolutely no malafides in the action of the petitioning creditor, particularly, when the record indicates that the petitioning creditor immediately took up the matter with the EOW, urging the EOW to withdraw such directions.

23. On 27 April 2013, the EOW issued a freeze order under section 102 of the Cr.P.C directing the petitioning creditor to freeze the Gitanjali shares. It is pertinent to record that the company did not even bother to challenge such freeze order, but, it was the petitioning creditor which instituted Criminal Application no. 483 of 2013 to challenge the same before this Court. By order dated 10 May 2013, this Court, directed that the freeze order dated 27 April 2013 would remain in force only till 24 May 2013 and within the said period, Sarvin and Trusha, the clients of the company, who had made the complaints of

fraud and manipulation against the company may approach the competent civil court and obtain appropriate orders.

24. Sarvin, it appears, challenged this Court's order dated 10 May 2013, before the Hon'ble Apex Court, which, restrained the petitioning creditor from alienating Gitanjali shares and directions were issued to this Court for final disposal of the petition on or before 26 June 2013. This Court by its order dated 22 August 2013 dismissed the petition instituted by the petitioning creditor herein. Again, the petitioning creditor herein preferred a special leave petition to the Hon'ble Apex Court, in which, an interim order was made permitting the petitioning creditor to sell balance 17.03 lakhs Gitanjali shares but to deposit the sale proceeds before the Hon'ble Apex Court. The aforesaid narration of facts, very clearly establishes that there were no malafides involved in the suspension of sale of shares by the petitioning creditor post 22 March 2013. Rather, the circumstance that the company took no serious steps to even question the EOW's letter or freeze order suggests that there are hardly any bona fides in the claim for damages. Further, the circumstance that the petitioning creditor continued to sell the Gitanjali shares until receipt of EOW's letter dated 23 March 2013 and thereafter chose to challenge the EOW's letter and freeze order indicates reasonability in actions of the petitioning creditor.

25. The decisions in case of Kritika Nagpal (*supra*) or Bonanza Commodities Brokers Pvt. Ltd. (*supra*), are not at all applicable to the facts in the present case. In the said two decisions, learned Single Judge of this Court was concerned with National Stock Exchange (Futures & Options Segment) Trading Regulations, including in particular the regulations which governed the relationship between brokers and their clients. In the context of such regulations, certain observations have been made in the matter of closing out of trades. Such a situation is not at all applicable to the facts of the present case.

26. Thus, even if the low threshold test as suggested in Portman (*supra*) is applied to consider whether the defence raised by the company is either bona fide or substantial, we are afraid that we will still have to hold that there are neither any bona fides nor any substance in the defence raised by the company. Besides, at least *prima facie*, the defence is untenable, both in law as well as on facts. In fact, the defence of such nature, if accepted, is likely to seriously erode the entire mechanism provided by stock exchanges for their operations.

Therefore, applying the principles laid down in Madhusudan Gordhandas (*supra*), we endorse the reasoning of the learned Company Judge as reflected in the impugned order.

27. In the result, we dismiss this appeal. There shall however be no order as to costs.

28. At this stage, learned counsel for the appellant seeks a stay on the advertisement of the petition for a period of four weeks from today. In the facts and circumstances of the present case, we do not accede to such request.

Accordingly, application for stay is rejected.