

(2013) 07 BOM CK 0122

In the Bombay High Court

Case No : Appeal No. 161 of 2013 in Contempt Petition No. 113 of 2012

SBI Global Factors Ltd.

APPELLANT

Vs

M/s. K. Sera Sera Production Ltd.

RESPONDENT

Date of Decision : 16-07-2013

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 4 BC 515 : (2014) 183 CompCas 266 : (2013) 4 CompLJ 75

Hon'ble Judges : S.C. Gupte, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Rahul Narchania with Mr. Amit Jajoo, Ms. Sushmita Gandhi and Mr. Rishabh Agarwal instructed by M/s. PKA Advocates, for the Appellant; Zal Andhyarujina instructed by . M/s. Joby Mathew and Associates, for the Respondent

Final Decision : Disposed Off

Judgement

D.Y. Chandrachud, J.—The appeal arises from the judgment of a learned Single Judge dated 30 November 2012 dismissing the petition for winding up filed by the Appellant. The Appellant had on 4 November 2005 granted to the Respondent a Reverse Factoring Facility in the amount of Rupees Fourteen crores. The extent of the facility was subsequently enhanced to Rupees Thirty crores on 20 May 2006. Cheques issued by the Respondent were dishonoured. Complaints were filed u/s 138 of the Negotiable Instruments Act, 1881 and the petition for winding up was instituted before the Company Court on 20 August 2009. On 17 September 2009, a letter was addressed by the Appellant to the Respondent in which it was stated that the amount payable by the Respondent as on 30 September 2009 was Rupees Thirty One crores. The Appellant stated that it was willing to reverse an overdue discount of Rupees One crore subject to full compliance with the terms of the arrangement as reflected in the letter upon which the residual amount payable was Rupees Thirty crores. The terms and conditions subject to which the Appellant agreed to the restructuring of the facility were that:

(i) The Respondent would pay an amount of Rupees Five crores no later than 30 September 2009;

(ii) The Respondent would make a further payment of Rupees Two crores in six equated monthly instalments together with interest;

(iii) The balance of Rupees Twenty-four crores would be converted into Optionally Convertible Redeemable Bonds (OCRBs). The bonds were to be subject to the condition that the Appellant will have the option to convert them into equity shares after twelve months from the date of issue and upto eighteen months. The Appellant would have an unfettered discretion either to exercise or not exercise the option to convert the bonds into equity shares. The Respondent had to complete all formalities for conversion of the bonds into equity shares within twenty-four hours of a notice of conversion and the bonds were to be issued on or before 1 October 2009, failing which the amount would carry interest as stipulated;

(iv) A mortgage in respect of a residential flat belonging to an ex-director of the Respondent would be created by a deposit of title deeds coupled with a guarantee.

2. Clause 11 of the letter of restructuring contained the following stipulation:

Notwithstanding anything contained in this letter, until the Bonds have been issued to GTF in form and substance satisfactory to GTF and all the terms and conditions of this letter have been complied with by KSS, GTF reserves all its rights in relation to the defaults under the Facility. Any failure of GTF to exercise, or any delay by GTF in exercising any right or remedy, or anything else which GTF has or may have agreed to do or done or may in the future agree to do (including receipt and/or acceptance of any sum payable under the facility) does not, shall not and is not intended to operate as a waiver of any rights of GTF arising from the previous defaults of KSS or of any of KSS's obligations.

(Emphasis supplied)

Subsequently on 19 October 2009, the spouse of the ex-director addressed a communication to the Appellant irrevocably agreeing and confirming that she would create a mortgage in respect of the residential flat by handing over title deeds in original within twenty days. Admittedly, the title deeds were not handed over and the mortgage was not created.

3. The Respondent issued bonds to the Appellant. On 8 March 2011, the Appellant made a request for conversion of the bonds into equity shares.

4. The Appellant recalled the entire loan by a notice dated 31 May 2011 and instituted a winding up petition after issuance of a statutory notice.

5. The learned Single Judge dismissed the petition by the impugned judgment dated 30 November 2012.

6. The submission of the Appellant is that in breach of the terms and conditions governing the restructuring facility, the Respondent failed to:

- (i) Create a mortgage of the residential flat by deposit of title deeds;
- (ii) Convert the bonds into equity shares despite the exercise of option by the Appellant. Consequently, in terms of the letter of restructuring, more particularly Clause 11, the entire debt due under the facility became payable and was recalled by the Appellant.

The defence, it has been urged, as set out in the reply to the petition for winding up was palpably false. In the affidavit-in-reply, it was stated that the Appellant had failed to withdraw all the legal proceedings which an officer of the Appellant had agreed to do in terms of a handwritten endorsement which was made on 19 October 2009 when a payment of Rupees Five crores was made. It is urged that this is a patently incorrect reading of the handwritten endorsement which stipulated that the pending proceedings would be withdrawn only if, inter-alia, the bonds were issued and a mortgage was created in accordance with the letter of sanction and subject to strict adherence to the terms of sanction dated 17 September 2009 and 19 October 2009. Hence, it is urged that there is a debt due and payable and the learned Single Judge was manifestly in error in holding that there was substantial compliance with the terms of the sanction.

7. On the other hand, it has been urged on behalf of the Respondents that:

- (i) The debt due and payable to the Appellant stands replaced by a contractual settlement as reflected in the letter of restructuring dated 17 September 2009 which is accepted by the Respondent. In the event of a breach of the contract, the remedy of the Appellant must be to sue for specific performance or for damages and a winding up petition would not be maintainable;
- (ii) The Respondent had substantially complied with the terms and conditions of the letter of sanction dated 17 September 2009 read with the letter dated 19 October 2009;
- (iii) Even on 10 August 2011, the Appellant had indicated a willingness to comply with the terms of the sanction by the execution of a deed of mortgage.

8. On 17 September 2009, the Appellant restructured the trade and finance facility and communicated terms and conditions for acceptance to the Respondent. The Respondent accepted those terms and conditions by endorsing its acknowledgment, approval and acceptance at the foot of the letter. The dues of the Appellant as on 30 September 2009 were quantified at Rupees Thirty-two crores and after a reversal of an overdue discount of Rupees One crore, the residual amount due and payable was Rupees Thirty-one crores which was agreed to be restructured in terms of the letter. The Respondent had agreed to make a payment of Rupees Five crores and Two crores which was made though after some time. The balance of Rupees Twenty-four crores was converted into bonds. The Appellant was given an option of requiring the conversion of the

bonds into equity shares and the Respondent was obliged within twenty-four of a notice of conversion to complete the formalities for the conversion of the bonds into equity shares. There is no dispute about the fact that though on 8 March 2011 the Appellant exercised the option for conversion, the Respondent did not allot equity shares in compliance with its obligation to complete the conversion. Hence the Respondent was in breach of its obligations under the restructuring: firstly, it did not convert the bonds into equity shares and secondly, no mortgage was executed in favour of the Appellant.

9. The defence of the Respondent in the affidavit-in-reply was to the following effect.

9. As stated hereinabove it was one of the essential terms of the settlement that the Petitioner would withdraw all legal proceedings against the Respondent. This had been confirmed by the Petitioner even before the execution of the settlement and/or the sanction letters dated 17 September 2009 and 14 October 2009. This was reiterated by the Petitioner by making an endorsement on the photocopy of the aforesaid pay order of Rs. 5 crores (Annexure 4 hereto) stating that the Petitioner has received the said pay order and that it would withdraw the legal cases initiated by it against the Respondent.

10. Despite the aforesaid, the Petitioner failed and neglected to withdraw the Summary Suit and/or the Complaints against the Respondent. In view thereof, the Petitioner was not entitled to exercise any right to convert the said OCRBs into equity shares. As such, the Petitioner/GTFLs demand to convert OCRBs of Rs. 2 crores into equity shares was wrongful, illegal and/or in breach of the terms of the revised sanction letters.

10. There is merit in the contention of the Appellant that the defence is palpably dishonest and proceeds on a patently incorrect reading of the handwritten endorsement made by the officer of the Appellant on 19 October 2009. For convenience of reference, the handwritten endorsement is extracted hereinbelow.

Already filed legal cases shall be withdrawn only after payment of Rs. 2 crores on or before 31st, December, 2009 along with interest as per the terms and condition of the sanction letter dated 14th October, 2009 and realization of this draft along with the issuance of bonds and creation of mortgage as per the terms and condition of the above stated letter and strict adherence of the said terms of sanction letter dated 17th September, 2009 and 14th October, 2009.

Ex-facie, the endorsement stipulated that the Appellant would withdraw legal proceedings subject to various conditions being fulfilled including the creation of a mortgage in terms of the letter of sanction and strict adherence of the terms of the letters of sanction dated 17 September 2009 and 19 October 2009. The Respondent suggests that it was not obliged to convert the bonds into equity shares because the Appellant did not withdraw the legal proceedings. This is a thoroughly untenable reading of the handwritten endorsement which clearly stipulated that the withdrawal of the legal proceedings was subject to strict

compliance by the Respondent of the terms of the letter of sanction. Obviously, the Appellant did not agree to a withdrawal of proceedings instituted unless its constituent had complied with the terms on which the trade facility had been restructured.

11. The consequence of the failure of the Respondent to observe the terms of restructuring are made evident in Clause 11 of the letter of sanction dated 17 September 2009. Under Clause 11, until all the terms and conditions of the letter have been complied with by the respondent, the Appellant reserved rights in relation to the defaults under the facility. Consequentially, once the Respondent committed a default in complying with the terms and conditions of the letter of sanction, the Appellant was justified in recalling the amount due under the facility. The amount became due and payable on default. There is clearly a debt due and payable which fulfills the mandatory requirements for the institution of a proceeding for winding up.

12. There is no merit in the contention that the debt of the Appellant stands replaced by a contractual settlement and that the remedy of the Appellant must lie in an action for breach of contract either by a way of a suit for specific performance or a claim for damages. In the present case, there was no discharge of the debt. What the letter of sanction dated 17 September 2009 did was to restructure the debt subject to compliance by the Respondent of the terms and conditions stipulated therein. The debt was never extinguished. On a breach by the Respondent of the terms and conditions governing the sanction for restructuring, the Appellant was entitled to institute a proceeding for winding up on the basis of the inability of the Respondent to pay the debt.

13. Similarly, it is not possible to accept the finding of the learned Single Judge that there was substantial compliance of the letter of restructuring. The learned Single Judge has proceeded on the basis that there was an admitted breach on the part of the Appellant of the sanction letter in failing to withdraw the legal proceedings. This, with great respect, proceeds on an incorrect reading of the handwritten endorsement which is a matter of record before the Court. The fact that the Respondent was in breach of its obligation to comply with the terms and conditions governing the sanction is clear from the record. As a matter of fact, no mortgage was created by deposit of title deeds. The bonds were not converted to equity shares. An effort was made to mislead the Company Judge by filing before the learned Single Judge in Annexure-6, a typed statement that would seem to suggest that collateral security to secure the amount of Rs. 3.50 crores was created in respect of three residential properties. As a matter of fact, it is not disputed at the hearing that the title deeds were not deposited with the Appellant. An equitable mortgage cannot be created without the deposit of title deeds and merely on a typed statement.

14. Hence, we are of the view that the learned Single Judge was in an error in dismissing the petition for winding up. There is a debt due and payable to the Appellant. The Appellant is a financial institution and wholly a subsidiary of the

State Bank of India.

15. The Petition for winding up requires admission.

16. In the circumstances, while allowing the Appeal, we set aside the impugned order of the learned Single Judge. In consequence, the petition for winding up shall stand admitted and there shall be consequential orders in usual terms for the issuance of an advertisement and publication. The Appellant will deposit the costs, charges and expenses of the publication with the Company Registrar in two weeks.

17. Since the Appeal has been disposed of, it is not necessary for the court to pass any order on the Notice of Motion which was taken out pending the disposal of the Appeal for the grant of an interim order. We grant liberty to the Appellant to move the learned Single Judge for further reliefs. The Appeal is disposed of in these terms. There shall be no order as to costs.