

(2012) 11 BOM CK 0062
In the Bombay High Court
Case No : Company Petition No. 113 of 2012

SBI Global Factors Ltd.

APPELLANT

Vs

M/s. K. Sera Sera Production Ltd.

RESPONDENT

Date of Decision : 30-11-2012

Acts Referred:

Companies Act, 1956 — Section 433(e), 434(1)(a), 439
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 1 ALLMR 785

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Rafeeqe Peermohideen Along with Mr. Rishabh Agarwal instructed by M/s. Paras Kuhad and Associates, for the Appellant; Venkatesh Dhond, Along with Mr. Ashish Kamat, Shailesh Mendon, Ms. Dhanyashree Shah, Ms. Nikhila Reddy instructed by y M/s. Desai and Diwanji, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—The Petitioner is a financial institution and has invoked Section 433 (e) and (f) read with Sections 434 (1)(a) and 439 of the Companies Act (for short, the Act) and seeking an order of winding up. The Respondent Company has been listed on the Bombay Stock Exchange (BSE), National Stock Exchange (NSE) and Luxembourg Stock Exchange. On 4 November, 2005 and 20 May 2006, the Petitioner granted to the Respondent, Reverse Factoring facility initially for a sum of Rs. 14 crores, which was thereafter, increased to Rs. 30 crores. In 2008, the dispute arose between the parties. On 7 July, 2008, the Petitioner issued a recall notice against the Respondent.

2. In 2009, the Petitioner instituted Company Petition No. 884 of 2009 in this Court; Summary Suit No. 2238 of 2009 in this Court; and various criminal complaints u/s 138 of the Negotiable Instruments Act, 1881. The parties settled the disputes/claims recorded accordingly in terms of the Sanction Letter in September 2009. On 29 September, 2009, the Respondent paid Rs. 5 crores vide

Banker's cheque No. 103477 to the Petitioner. On 10 October, 2009, Notice of postal Ballot was issued to the shareholders of the Respondent for issuance of the Optionally Convertible Redeemable Bonds (OCRBs). On 14 October, 2009, an Addendum to Sanction Letter dated 17 September, 2009 was issued. The Petitioner made an endorsement on the photo copy of Bankers cheque of Rs. 5 crores dated 29 September, 2009 on 14 October, 2009.

3. On 9 November, 2009, Postal Ballot Forms received by the Respondent in connection with the issuance of the OCRBs. On 10 November, 2009, Resolution passed through Postal Ballot for issuance of OCRBs. On 10 November, 2009, an Application for in principal approval with the Bombay Stock Exchange and National Stock Exchange for issuance of the OCRB's made by the Respondent.

4. On 1 December, 2009, Respondent's letter to Petitioner (MD) inter alia recording that the Petitioner to withdraw all the legal cases forthwith pursuant to the compliance of terms and conditions of the sanction letter dated 17 September, 2009 alongwith its addendum term sheet dated 14 October, 2009. On 30 December, 2009, the Respondent paid Rs. 2 crores vide Pay Order No. 103827 in lieu of Rs. 2 crores payable from October, 2009 to March 2010.

5. On 15 January, 2010, received in principal approval from National Stock Exchange for issuance of the OCRBs. On 28 January, 2010, received in principal approval from Bombay Stock Exchange for issuance of the OCRBs. On 29 January, 2010, the Respondent allotted OCRBs for Rs. 23.67 crores in favour of the Petitioner. On 29 January, 2010, the Respondent paid Rs. 1 crore to the Petitioner vide Pay Order No. 000054.

6. On 16 February 2010, the Respondent's letter to the Petitioner inter alia, recording that the Respondent was willing to repay amount of Rs. 32,50,000/- in lieu of the shortfall in security. On 29 April, 2010, the Petitioner withdrew Company Petition No. 884 of 2009 against the Respondent.

7. On 24 January, 2011, the Respondent's Advocate addressed a Notice to the Petitioner, inter alia calling upon the Petitioner to withdraw all the civil and criminal cases initiated by the Petitioner against the Respondent in terms of the settlement. On 11 February, 2011, the Petitioner's letter in response to the Respondent's Advocate's Notice dated 24 January, 2011.

8. On 28 February, 2011, the Respondent's wrote letter to the Petitioner (MD) inter alia calling upon the Petitioner to withdraw all the legal cases forthwith. On 8 March, 2011, the Petitioner written letter to the Respondent exercising their right to convert OCRBs of Rs. 2.00 crores face value with interest thereon into equity shares.

9. On 31 May, 2011, Statutory Notice from Petitioner Advocates to the Respondents inter alia, alleging that the Respondent was in breach of the terms of the Sanction Letter and purporting to terminate the Sanction Letter.

10. On 10 August, 2011, reply by Respondent's Advocate letter to the Statutory

Notice. On 23 August, 2011, Respondent's Advocate letter to the Petitioner's Company Secretary recording that the Respondent had not committed any default which would require reporting to Credit Information Bureau (India) Ltd.

11. On 19 September, 2011, Respondent filed suit No. 2530 of 2011 against the Respondent seeking declaration that the sanction letters dated 17 September 2009 and 14 October 2009 are valid and sought specific performance thereof.

12. The Petition is dated 22 August 2011 filed by the Petitioner after delivering Statutory Notice dated 31 May, 2011 on the foundation of claim to an aggregate sum of Rs. 31,18,89,184/- with further 18% interest per annum, alleged to be due and payable in respect of the trade finance facilities. The Respondent, by its reply dated 28 June, 2012 resisted the claim/averments in all respects. The Petitioner filed rejoinder dated 4 June, 2012 and re-iterated the basic case/submissions. A further affidavit dated 14 August, 2012 was also filed by the Respondent, basically to demonstrate the Respondent's solvency and credit worthiness, referring to Respondent's Auditor's certificate as on 31 March, 2012 to show that the net worth is over Rs. 284 crores.

13. It is necessary to note in the matter, in view of the affidavit and documents so read and referred by the parties, whether there are triable issues raised and which can be adjudicated in the present Company Petition and/or in the pending Suit/proceedings. Whether the Respondent Company is in breach of terms and conditions of the Sanction letter. The pendency of summary suit and criminal proceedings referring to erstwhile debt. The aspect of breach of Sanction Letter and revocation and/or re-calling of the lending is also important factor. All actions in breach of the Sanction Letter whether disentitle the Optionally Convertible Redeemable Bonds into the Equity shares. It also necessary to adjudicate the entitlement of the Respondent to specific performance of the Sanction Letter.

14. There is no denial to the settlement between the parties which was reflected in terms of the Sanction Letter dated 7 September, 2009 read with other correspondences. The Petitioner admittedly withdrew Company Petition No. 884/2009, but not the summary suits and the complaints u/s 138 of the Negotiable Instrument Act. This admitted breach of the Sanction letter which was after settlement between the parties, in my view also goes to the root of the matter for passing any winding up order at the instance of the Petitioner at this stage of the pendency of the proceedings, including this one.

15. There is no dispute that in pursuance to the settlement/the Sanction Letter, Pay Order dated 29 September, 2009 of Rs. 5 crores was deposited. The endorsement made thereon that they would be withdrawing all proceedings against the Respondent just cannot be overlooked. The Respondent Company paid Rs. 2 crores by one installment dated 30 December, 2009 instead of paying the amount in installments from October, 2009 to March, 2010. The Petitioner admitted this amount without any protest.

16. There is no dispute that the Respondent got approval from its shareholders and the Bombay and National Stock Exchanges for issuance of the Bond of Rs. 24 crores and accordingly Bond of Rs. 23.67 crores were issued by the Respondent to the Petitioner and the same were accepted by the Petitioner without any protest. The further payment of Rs. 1 crore was made on 29 January 2010. The offering of collateral securities in the sum of Rs. 3.5 crores is also mentioned in the reply to the statutory notice by the Respondent.

17. It is relevant to note that the Petitioner's claim so raised just cannot be accepted as agreed due and payable amount as contemplated under the provisions of the Act, basically to exercise discretionary and/or equitable jurisdiction. The relevant documents, events and the conduct of the parties apart from the clear disclosure of facts and documents are also relevant factor which the Court need to take into consideration before passing the order. The effect of the Sanction Letter and the fact that the Respondent has already acted upon and the Petitioner already got the requisite amount pursuant to the same, but failed to perform his reciprocal obligation of withdrawing the summary suit and the criminal proceedings and/or the effect of this inaction unless adjudicated and decided, it is not possible to consider the case of the Petitioner in such fashion. The question of converting the said OCRBs into equity shares and the demand so made. The Court need to consider the bonafide dispute so raised by the Respondent Company in such matter basically in view of the undisputed position on record referring and/or revolving around the Sanction Letter.

18. The Supreme Court in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., , has observed as under :

20. A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.

34. A creditor's winding-up petition, in certain situations, implies insolvency or financial position with other creditors, banking institutions, customers and so on. Publication in the newspaper of the filing of winding-up petition may damage the creditworthiness or financial standing of the company and which may also have other economic and social ramifications.

19. The Company Judge, therefore, in view of the above position of law need to

consider whether the dispute so raised and/or objection raised and/or contention so raised, opposing the winding up petition, has some substance and/or whether it is bonafide and/or just not farce and moonshine defence. The Court also need to consider that even if there is a case of balance payment and/or amount ought to have been and/or required to be paid, but still whether the Company deliberately and/or intentionally avoiding to make due and/or crystalized amount so demanded. It is settled that the amount should be due and payable and crystalized basically when the statutory demand is made and also on the date when the Company Petition is filed with the averments to wind up the Respondent Company on the foundation that the Company deliberately, intentionally, though have a capacity and/or no capacity, unable and not in a position to pay the demanded crystalized amount and/or such related aspects.

20. Admittedly, as there arose dispute between the parties, referring to the First Sanction Letter dated 4.11.2005 and as parties arrived at settlement and entered into an agreement and accordingly reflected in the Sanction Letter dated 17 September 2009 and in fact, both the parties have acted upon the same. The alleged breach, if any, of terms and conditions of Last Sanction letter itself means the Court need to consider the rival contentions as well as documents placed on record to justify their respective case/submissions. Having once for re-structuring and in fact accepted the payment of Rs. 5 crore and the Bonds worth Rs. 23.67 crores out of Rs. 24 crores as agreed, I am inclined to observe that there was substantial compliance based upon the re-structuring in question. The Petitioner, therefore, just cannot re-open and re-call the original claim based upon the first sanction letter in question to invoke jurisdiction of the Court under the Companies Act for winding up the Respondent Company.

21. There is no dispute with regard to the endorsement made and decided by both the parties. The fact of endorsement itself means that there was agreement which in fact agreed upon by the parties and acted accordingly. There is no denial to the fact of the contents of the endorsement. The basic dispute is that the endorsement or record made only for winding up petition and not for all other purposes. This, in my view, just cannot be adjudicated on the basis of averments so made in the Petition and basically by the Company Judge. The re-structuring, if it was by consent of the parties and in fact as recorded above accepted the substantial payment based upon the same and as alleged, the Petitioner, if fail to perform their part of the terms and conditions and as pointed out referring to the civil as well as criminal proceedings, to say that the Respondent Company has committed default deliberately and to avoid the payment and/or crystalized the amount not acted further and, therefore, the Petitioner has no choice, but to move this Petition for winding up.

22. The parties have entered into the restructuring, the dispute with regard to the same unless adjudicated and/or settled, whichever way the parties wants, I am not in a position, in view of the above accepted case of the Petitioner and also not inclined to exercise discretion in favour of the Petitioner to pass order of

winding up as prayed. I am not deciding the merits of the matter as all rival contentions so raised, I am concerned with the present winding up petition and, therefore, observation, even if so made, is only for deciding the present winding up petition. Resultantly, the Company Petition is dismissed. There shall be no order as to costs. All contentions are kept open.