

(2013) 02 CAL CK 0070
In the Calcutta High Court
Case No : CP No. 591 of 2011

SSS Loha Marketing Private Limited

APPELLANT

Vs

Bibby Financial Services India Private Limited

RESPONDENT

Date of Decision : 05-02-2013

Acts Referred:

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

Citation : (2013) 3 BC 287 : (2013) 2 CALLT 139 : (2013) 2 CHN 218 : (2013) 2 WBLR 298

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : M.S. Vinayak, Mr. Swatarup Banerjee and Ms. Nasreen Kouser, for the Appellant; Samit Talukdar Mr. Reetobroto Mitra and Mr. Suman Dutta, for the Respondent

Judgement

Sanjib Banerjee, J.—The company takes a preliminary objection that no presumption arises in this case of the company's inability to pay its debts since no notice was issued by the petitioning creditor at the registered office of the company and, on the basis of the petition, it would be evident that the two other limbs of Section 434(1) of the Companies Act, 1956 are not attracted. Upon this creditor's petition for winding up the company being served on the company, affidavit directions were issued on November 29, 2011. The company indicated on such date that the petition was not maintainable in the absence of any statutory notice having been issued. However, on February 8, 2012, the parties agreed that the petition would remain adjourned sine die but the petitioner would be entitled to seek inclusion of the petition in the list upon a default being made by the company in CP No. 592 of 2011 in making payment to the petitioner in such proceedings in terms of the order passed in CP No. 592 of 2011 on the same day. Simultaneously, a concession was recorded on behalf of the petitioning creditor that if the company in CP No. 592 of 2011, Ramsarup Industries Limited, did not make default in making payment in terms of the order passed in CP No.

592 of 2011, the petitioner herein would take no further steps in the criminal proceedings launched against the directors and officers of this company in Gurgaon. Ramsarup Industries Limited has defaulted in making payment in terms of the order passed on February 8, 2012 in CP No. 592 of 2011. Consequently, the petitioner herein has caused this matter to be taken up for hearing.

2. It is the admitted position that the present petition is founded on a notice dated May 28, 2010 addressed to the company and three of its directors and captioned as a notice u/s 138(b) of the Negotiable Instruments Act. The notice, issued by advocate representing the petitioner, did not refer to the Companies Act but demanded payment of a principal sum in excess of Rs. 4 crore together with interest thereon within 15 days of the receipt of the notice and warned of legal action being initiated in default of the payment being made as demanded. The notice was issued to the erstwhile registered office of the company at 12A Netaji Subhas Road, Kolkata. In the cause title relating to this petition, the petitioner has indicated the registered office of the company to be at 18/1 Maharshi Debendra Road, Kolkata 700 007.

3. The company says that paragraph 17 of the petition makes it clear that the creditor's action is founded on the notice of demand issued at the registered office of the company since it has been pleaded "that a period of more than three weeks has elapsed since the service of its notice of demand upon the respondent, for the amounts due and owing to it." It, however, does not appear from the body of the petition that the notice of May 28, 2010 is claimed to be the statutory notice as paragraph 13 of the petition speaks of several notices of demand being made on the company and copies of the several notices, including the notice of May 28, 2010, are appended collectively as annexure F to the petition.

4. The petitioner says that it would be evident from the several letters, copies whereof have been disclosed in the pleadings, that notwithstanding the registered office of the company having apparently been shifted from Netaji Subhas Road to Maharshi Debendra Road in February, 2009, the letter-head of the company in letters issued as late as in November, 2009 showed that its registered office was at Netaji Subhas Road and the one at Maharshi Debendra Road was only as administrative office. The petitioner refers to Section 147(1)(c) of the Act to suggest that it is incumbent on a company to have its registered office mentioned in all its business letters and the failure by a company to comply with such provision visits the company with a fine which may extend to Rs. 5000/-. The petitioner insists that in the wake of the mandatory provision of Section 147(1)(c) of the Act and the company's false representation in letters issued by it several months after the alleged change of its registered office, the preliminary point urged by the company should be brushed aside. The petitioner asserts that the nature of the claim, the dishonour of cheques issued by the company and the complete lack of defence to the claim should prompt the court

to infer the inability on the part of the company to pay its debts even if no notice u/s 434(1)(a) of the Act has been issued at the registered office of the company.

5. The petitioner suggests that merely because a notice has not been issued by a petitioning creditor to the registered office of the company would not disentitle the creditor from seeking winding up of the company by relying on the legal fiction in Section 434(1)(a) of the Act. According to the petitioner, as long as there is a valid claim and the company is notified in writing thereof and the company fails to discharge the debt without there being any reasonable cause for not so doing, the company court is empowered to infer the company's inability to pay its debts by virtue of clause (a) of Section 434(1) of the Act.

6. In such context, the petitioner first refers to an unreported judgment of the company Judge in the Allahabad High Court rendered on February 5, 2003 in CMRA No. 155372 of 2002, CP No. 7 of 2002 (Om Prakash Jaiswal v. Shekhraj Hotel (P) Ltd.). In that case, the creditor inspected the records of the registrar of companies and discovered that the registered office of the company had been shifted to a new address. The statutory notice was addressed to such registered office of the company. Upon it returning unserved, substituted service was effected by publishing the notice in a widely-circulated newspaper published in Lucknow and Varanasi. When the petition came up before the court and the notice returned unserved, substituted service was effected in the same newspapers. The court then proceeded to pass appropriate orders. In course of the recalling application, the court found that the registered office of the company had been shifted with mala fide intent and from place to place. It is on such ground that the court refused to recall the order of winding up. A Madras High Court judgment reported at 114 Comp Cas 207 (Indian Oil Corporation Ltd. v. NEPC India Ltd.) is next placed by the petitioner. The court in that case noticed that the written demand may not have been received by the company at its registered office but observed that when the company "has acted on the basis of the letter issued ... immediately before the despatch of the statutory notice, ... it is not open to the (company) to contend that the statutory notice was addressed to the old address and hence, the statutory notice is not valid." The judgment refers to another case of the same court reported at Rajearajeswari Packaging Products Vs. Dev Fasteners Ltd.,

7. The Allahabad case is distinguishable on the ground that the statutory notice in that case was served at the registered office of the company upon the creditor ascertaining the same from the office of the registrar of companies. The Madras judgment does not appear to be good law and, in any event, cannot be accepted in this court in the light of the view taken by a Division Bench of this court that still holds good.

8. In the judgment of the Division Bench reported at Bukhtiarpur Bihar Light Railway Co. Ltd. Vs. Union of India (UOI) and Another, it has been unequivocally recognised that it is imperative that all conditions of a deeming provision are complied with if the legal fiction thereunder is sought to be established. The

statutory notice in such case was issued by the creditor to an office of the company other than its registered office. Despite the company not urging such ground, it was the court which found that the legal fiction would not be available to the creditor, as is evident from paragraph 13 of the report:

(13) It appears to us, however, that although the learned counsel for the appellant did not himself lay much stress on his first point, it is yet a point which must succeed. According to the petition for winding up itself, the registered office of the Railway Company is situated at No. 135, Canning Street, Calcutta. That being so, if a notice of demand was to operate as a valid statutory notice under S. 163(1)(i) of the Indian Companies Act, it would have to be delivered to the Company at its registered office. The letter of June 6, however, was addressed to "Fraser Road, Patna" which was not the appellant Company's registered office. That fact is sufficient to prevent the Union of India from relying upon the notice of 6-6-1950, for the purposes of S. 163(1)(i) of the Act.

"There was indeed a second notice as well which was delivered at the registered office of the appellant company, but that notice was sent only on 30-6-1950, and therefore it could not serve as a statutory notice of demand, seeing that the petition for winding up was made on July 18. The interval between the service of the notice of demand and the making of the petition for winding up was less than three weeks. I ought to state here that on behalf of the Union of India, Mr. Kar admitted that there was no statutory notice of demand in the case on which his client could rely and he also informed us that the court of appeal had already so held in connection with the application for a stay of the order which is under appeal before us now.

9. The judgment in Bukhtiarpur Bihar Light Railway Co. Ltd. instructs that the court must be strict in assessing whether all the conditions laid down in Section 163(1)(i) of the Indian Companies Act, 1913 (Section 434(1)(a) of the Companies Act, 1956 carries the same provision in the successor statute) have all been complied with before the inference of the inability of the company to pay its debts based on the legal fiction therein is drawn. The judgment is the specific recognition, in the context of the identical provision in the predecessor statute as Section 434(1)(a) of the current Act, of the general principle that a deeming provision must be strictly construed and all conditions therein must have been adhered to before the legal fiction thereunder can be seen to operate.

10. In the light of the law as enunciated in Bukhtiarpur Bihar Light Railway Co. Ltd., it is not open to the company Judge of this court to accept that the inference of a company's inability to pay its debts may still be made by court u/s 434(1)(a) of the Act even if the notice provided for thereunder is not addressed to the registered office of the company. The petitioner admits that clause (b) of Section 434(1) has no manner of application in the present case; and, that the petitioner has not brought adequate material to prove the company's inability to pay its debts under clause (c) thereof.

11. The petitioner says that in view of the company's conduct and what the petitioner perceives to be a thoroughly dishonest defence, it would be just and equitable to wind up the company. While it may be inappropriate to rule out the application of the just and equitable clause even to a creditor's winding up petition, there is not enough material that has been placed before court in such regard. The petitioner's claim is on account of a bill discounting facility accorded to the company under which the company obtained material from a third party seller and the petitioner made immediate payment to the seller against the company's promise to repay the petitioner with interest at a future date. The company's case is that the money covered by the dishonoured cheques has been paid to the seller and the petitioner should look to the seller to realise the dues. Though there is substantial basis to the petitioner's assertion that the company's alleged payment to the seller may not discharge the company of its obligation to pay the petitioner, the facts are not such as would prompt the company court to admit the petition on the ground that it is just and equitable to wind up the company despite the presumption as to the company's inability to pay its debts not having been established by the petitioner.

12. CP No. 591 of 2011 fails and it is permanently stayed on the ground that the company's inability to pay its debts has not been made out and the facts as pleaded do not warrant consideration of the petition for winding up on the just and equitable ground. Nothing in this judgment will preclude the petitioner from instituting appropriate proceedings against the company in accordance with law and the observations here should not count against the petitioner in such proceedings. There will be no order as to costs. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.