
(2018) 09 BOM CK 0068

In the Bombay High Court

Case No : Appeal Lodging No. 200 Of 2018, Company Petition No. 1205 Of 2015
With Notice Of Motion (L) No. 413 Of 2018

Stonemann Royale Limited

APPELLANT

Vs

Asset Reconstruction Company (India) Ltd

RESPONDENT

Date of Decision : 07-09-2018

Acts Referred:

Companies Act, 1956 — Section 434(1)(a)

Citation : (2018) 09 BOM CK 0068

Hon'ble Judges : A.S. Oka, J;M.S. Sonak, J

Bench : Division Bench

Advocate : Vishal Kanade, Dipti Das, Anagh Pradhan, Mayur Khandeparkar,
Shakib Dhorajiwala, Supriya Majumdar

Final Decision : Disposed Off

Judgement

M. S. SONAK, J

1. Heard learned counsel for the parties.

2. This appeal is directed against the order dated 19th March, 2018 made by the learned Company Judge admitting and ordering the advertisement of

Company Petition No. 1205 of 2015 seeking winding up of the appellant company.

3. Mr. Vishal Kanade, learned Counsel for the appellant submits that as against the claim of the respondent in an amount of approximately Rs. 5.34

Crores, the appellant company has more than ample security, interÂalia, in the form of immovable properties. He submits that from the statement of

financial details handed over to the learned Company Judge, it was apparent that at least from 2015 onwards the appellant company was making

profits. He submits that in terms of the law laid down by the learned Single Judge of the Calcutta High Court in Eastern Spinning Mills and Industries

Limited Â 2012 SCC OnLine Cal 11500, the Company Judge ought not to have admitted petition for winding up of a company where the company

was in a position to secure the claim or the demand made by a petitioning creditor.

4. Mr. Kanade submits that Section 434 (1)(a) of the Companies Act, 1956 raises a legal fiction that a company shall be deemed to be unable to pay

its debts only where the company, despite receipt of statutory notice neglects to pay the sum or to secure the same to the reasonable satisfaction of

the creditor. Mr. Kanade submits that from this, it is quite clear that where a company is in a position to secure the sum, even assuming the same to

be an undisputed sum, the Company Judge ought not to even admit a petition seeking winding up of the company. Mr. Kanade submits that on this

ground itself and without going into the issue as to whether the debt claimed by the petitioning creditor was disputed or not, the learned Company

Judge ought to have dismissed the petition seeking winding up of the appellant company.

5. Mr. Kanade further submits that in terms of agreed one time settlement (OTS) facility, the appellant company was to pay an amount of Rs.25.25

Crores to the respondent. Out of this, admittedly, approximately an amount of Rs. 19.10 Crores was in fact paid. There was some dispute as regards

the balance amount of approximately Rs.5.34 Crores. Therefore, the same remained to be paid. Mr. Kanade submits that the respondent has remedies

for recovery of such disputed amount by resort to the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of

Securities Interest Act, 2002 (SARFAESI Act). Mr. Kanade submits that the appellant company has made profits for the last two years and is in good

financial health. All these are relevant considerations for dismissal of company petition seeking winding up of the appellant.

6. Mr. Khandeparkar, learned Counsel for the respondent submits that there is absolutely no dispute that the appellant company is due and payable to

the respondent, on account in excess amount of Rs.5.34 Crores. Apart from the documents in relation to the OTS facility availed by the appellant

company, there are several other documents which make it clear, that there is absolutely no dispute with regard to the said amount. Mr. Khandeparkar

points out that no specific security has been offered in relation to such amount and simply stating that the appellant company has assets which are

sufficient to secure this amount, is by no means sufficient to ward off admission of petition seeking winding up.

7. Mr.Khandeparkar points out that the decision of the Calcutta High Court in Eastern Spinning Mills and Industries Limited (Supra) is distinguishable.

He submits that the issue whether the security is really sufficient or not can only be gone into at the stage of final hearing of the petition for winding

up and not at the stage of admission. He relies on the decisions of this Court in SICOM Ltd. Vs. Entertainment World Developers Pvt. Ltd. [2016]197 CompCas195(Bom) and Bharat Overseas Bank Ltd. Vs. Shree Arcee Steels P.Ltd. [1985]58 Comp Cas 174. For all these reasons he

submits that this appeal may be dismissed.

8. The rival contentions now fall for due determination.

9. The respondent is the assignee of the rights of South Indian Bank Limited, which had, vide deed of assignment dated 22nd March, 2014 assigned

the debts due to it from the appellants along with all underlying securities thereto. There is no dispute that the appellant had availed credit facility to the

extent of Rs.9.00 Crores and a term loan to the extent of Rs. 75.00 Lakh from the South Indian Bank Limited. Certain documents towards

hypothecation of movable properties and personal guarantees of the directors had been obtained by the South Indian Bank Ltd. There is also no

serious dispute that the appellant defaulted in the repayment of the amounts availed as and by way of credit facility and term loan.

10. The appellant, on affidavit admitted that it had agreed to OTS of Rs.25.25 Crores against which, it paid Rs. 19.90 Crores.

According to the respondent, the appellant paid only Rs. 19.79 Crores. This leaves a balance amount of Rs. 5.34 Crores. The appellant has merely

described this amount as a 'disputed amount' without in any manner qualifying as to why such amount must be regarded as a 'disputed amount',

particularly when the appellant has on affidavit admitted that it had agreed to OTS of Rs.25.25 Crores.

11. The material on record bears out that there is no serious dispute regards appellant's liability to pay at least an amount of Rs. 5.34 Crores to the

respondent. In fact, in paragraph 24 of the impugned order, the learned Company Judge has noted that though the appellant has attempted to raise

various disputes in its affidavit in reply, the balance sheet of the appellant,

which reflects the position as on 31st March, 2017 indicates that the appellant had in fact accepted the liability to pay such an amount to the respondent. This, coupled with the part payments made by the appellant towards the OTS facility availed by it, amply establishes appellant's liability to pay at least a sum of Rs. 5.34 Crores to the respondent.

12. There is no merit in Mr Kanade's contention that a petition seeking winding up of the appellant is not maintainable unless the respondent exhausts

the remedies for recovery of the amount under the SARFAESI Act. The scope and import of proceedings for recovery of amount under the

SARFAESI Act and petition seeking winding up of a company for failure to pay admitted debts, is quite distinct and different. In fact, in *Viral*

Filaments, Mumbai Vs. Indusind Bank, Mumbai; 2001(3) Mh.L.J. 552, *UCO Bank Vs. M/s. Zoom Developers Pvt. Ltd.* 2014 SCC OnLine MP

7454 and *Asian Power Controls Ltd. Vs. Bubbles Goyal* 2013(3) Mh.L.J. 811 the contention as raised, has been expressly negated.

13. Even, the contention that the financial health of the appellant has improved, has been considered by the learned Company Judge in some detail in

the impugned order. In any case, the appellant cannot raise the defense that it has the ability to pay, but it chooses not to pay the disputed debts in a

petition of this nature.

14. In *IBA Health (India) Private Limited Vs. InfoDrive Systems SDN, BHD* 2010(10) Supreme Court Cases 553 the Apex Court has held

that when there is no dispute to the company's liability, the solvency of the company might not constitute a stand alone ground to defend a petition

seeking its winding up. If the debt is undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should not be

able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency is relevant as to

whether there was a dispute as to the debt but not as a stand alone ground.

15. In *M/s. Madhusudan Gordhandas & Co. Vs. Madhu Woollen Industries Pvt. Ltd.* 1971(3) Supreme Court Cases 632 the Apex Court has held

that where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to

pay that particular debt. Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact

amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt. The principles on which the court acts are, firstly that the defence of the company is in good faith and one of substance and 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.

16. The contention based upon Eastern Spinning Mills and Industries Limited (Supra) also deserves no acceptance in the facts of the present case.

Firstly, there is no material on record to indicate that the debt which is admittedly owed is sufficiently secured. Secondly, the appellant, through its counsel stated that the subject matter of sale of the assets of the appellant is pending before the Debt Recovery Tribunal (DRT), and therefore, the appellant cannot agree to sale or liquidation of its assets. In such a situation it can hardly be said that the debt which is owed by the appellant to the respondent is sufficiently secured.

17. That apart, the Division Bench of this Court in Bharat Overseas Bank Ltd. (supra) has clearly held that the Company Court will not be justified in

dismissing a petition for winding up at the stage of admission merely on the ground that the petitioning creditor is a secured creditor. The petition, in

such a situation, is required to be admitted and advertised and it is only thereafter can the Company Court go into the question as to whether the

security is sufficient or not and exercise its discretion to accept or reject the petition seeking winding up of the company.

18. In SICOM Limited (supra), the learned Company Judge of this Court, followingÂ Bharat Overseas Bank Ltd. (supra) rejected a similar

contention that a winding up petition ought not to even be admitted when the entire claim of the petitioning creditor was fully secured by mortgage of

immovable property.

19. Incidentally, we must note that the Division Bench in Bharat Overseas Bank Ltd. (supra) had expressly approved the law enunciated by at least

two learned Single Judges of the Calcutta High Court in India Electric Works Ltd. Â [1970] AIR 1970 Cal 398, Calcutta Safe Deposit Co. Ltd. Vs.

Ranjit Mathuradas Sampat [1971] 41 Comp Cas 1063 (Cal). However, in Eastern Spinning Mills and Industries Limited (supra) the learned Single

Judge of the Calcutta High Court has held that the rulings in India Electric Works

Ltd. (supra) and Calcutta Safe Deposit Co. Ltd,(supra) are affected by the rule of subÂsilento and further that Bharat Overseas Bank Ltd. (supra) does not appear to reflect the correct position in law. With respect, we must say that we have no hesitation in following the decisions of our Division Bench in Bharat Overseas Bank Ltd. (supra) in preference to Eastern Spinning Mills and Industries Limited (supra), particularly, since at this stage, we are concerned only with the issue of admission of the petition seeking winding up of the appellant and not with the issue as to whether such a petition should be finally allowed and the appellant be ordered to be wind up.

20. Once, the petition is admitted and advertised, it is possible that other persons as contemplated in the notice to be advertised in form 48 apply and appear before the Company Court either to support or oppose the petition for winding up of the company. The complete and clear position of the assets and liabilities of the company can then be assessed not just qua the petitioning creditor, but also either creditors, if any, as reflected in the balancesheet. This is not to say that the issue of securities offered by the company is some irrelevant issue. All that we say that such an issue can be better appreciated once the complete and clear picture of the company's financial health is before the Company Court, once the petition is admitted and advertised in accordance with law. This is the reason why the Division Bench of this Court in Bharat Overseas Bank Ltd. (supra)has held that the Company Court would not be justified in dismissing a petition for winding up at the stage of admission on the sole ground that the petitioning creditor is a secured creditor or that the claim raised by the creditor is sufficiently secured, even though, there may be no serious dispute that the debt is clearly owing and payable.

21. Upon cumulative consideration of all the aforesaid factors, we see no good ground to interfere with the impugned order dated 19th March, 2018 made by the learned Company Judge. This appeal is therefore dismissed . There shall be no order as to costs.

22. Pending notice of motion does not survive and the same is disposed of.