

**(2013) 12 DEL CK 0185**  
**In the Delhi High Court**  
**Case No : Co. Petition No. 542 of 2012**

Tata Capital Financial Services Ltd.

APPELLANT

Vs

Clutch Auto Ltd.

RESPONDENT

---

**Date of Decision :** 12-12-2013

**Acts Referred:**

Companies Act, 1956 — Section 433(e), 434(1)(a)

**Citation :** (2014) 2 AD 163 : (2014) 183 CompCas 164 : (2014) 141 DRJ 55

**Hon'ble Judges :** R.V. Easwar, J

**Bench :** Single Bench

**Advocate :** Akhil Sibal and Ms. Saloni Chowdhary, for the Appellant; Raman Kapur and Mr. Manish Kumar and Mr. Piyush Kaushik, for the Respondent

---

## Judgement

R.V. Easwar, J.—This is a petition filed by the petitioner u/s 433(e) of the Companies Act, 1956 seeking winding up of the respondent-company for non-payment of the dues of approximately Rs. 2.9 crores. The broad facts are that the petitioner financed the respondent-company which was supplying automobile clutches to various automobile manufacturers including TATA Motors. The finance was provided essentially for the purpose of working capital requirements of the respondent company. The total credit facility extended by the petitioner was Rs. 3.30 crores to be secured by a lien on the stocks, shares, property and book debts belonging to the respondent-company. The first tranche of the credit facility amounting to Rs. 1,96,95,280/- which was disbursed on 23.2.2012 became due on 23.3.2012. The second tranche for Rs. 1,32,45,104/- which was disbursed on 6.3.2012 became due on 6.4.2012. Despite several reminders the respondent could not pay back the amount, compelling the petitioner to serve a "loan recall notice" in September, 2012. Thereafter, the statutory notice u/s 434(1)(a) of the Act was served on the respondent, calling upon the respondent to return the amounts with interest at the agreed rates within 21 days, failing which winding up proceedings were threatened to be taken. There is no dispute that the notice was served on the respondent-company at its registered office on 3.10.2012. There was no reply to the statutory notice and hence the present

winding up petition.

2. Initially there were talks for settlement between the parties but then they failed and on 2.9.2013 this Court passed an order admitting the company petition but deferred further proceedings such as publication of citation in the newspapers and appointment of provisional liquidator for a period of 8 weeks to enable revival of the talks or settlement proposals, at the initiative of the respondent-company. It was observed by this Court in the said order that in case nothing happens at the end of the 8 weeks period, the law will take its own course.

3. The reasons which prompted this Court to admit the company petition, but defer further proceedings, are given in the order dated 2.9.2013 in the following words:-

I have considered the matter and I have also examined the audited balance sheet as on 31.3.2012 and the unaudited financial results for the quarter ended 30.6.2013. The sales have fallen drastically. However, considering the fact that the operations are being shifted from Faridabad to Biwadi there seems to be a possibility that the revival attempt may succeed and the company in due course may be able to pay back or meet its liabilities. This is a company which has been supplying automobile clutches to Tata Motors from 1974. Today it appears to be in some difficulty due to labour strikes. Operations have been, no doubt, closed but there is an attempt to revive the same by shifting the factory to another place. The audited and unaudited financial statements, in my opinion, do not present such a dismal picture as on date but this is not to downplay the claim of the learned counsel for the petitioner that it cannot wait for the payment of the dues. Having regard to the aforesaid circumstances, I admit the company petition. However, the further proceedings such as citation in the newspapers and the appointment of provisional liquidator are deferred for a period of 8 weeks from today. This is only to enable the talks or settlement proposals, if any, for which the initiative should be taken by the respondent company. In case nothing happens at the end of 8 week period, the law has to take its own course.

4. When the matter was taken up for further proceedings on 12.11.2013, the learned counsel for the petitioner submitted that no initiative was taken by the respondent-company for any talks or settlement proposals and therefore as stated in the order dated 2.9.2013, the publication of the citation in the newspapers and the appointment of provisional liquidator should follow.

5. The learned counsel for the respondent while rebutting the submissions of the learned counsel for the petitioner filed a compilation and drew my attention to the Techno-Economic Viability Report of the Restructuring/Rehabilitation Proposal dated December, 2012 prepared by one Sonalal Datta of Industrial and Management Consultants, Kalkaji, New Delhi. In particular he drew my attention to the following:

(a) Para 2.5.4 of the report in which the production facilities of the respondent-

company have been stated to be satisfactory and it was opined by the consultant that considering the all-round increase in prices, the level of operation (in value) is achievable subject to availability of orders and adequate working capital funds. The achievable level of operation was pegged at Rs. 250 crores during the year 2013-2014 and at the level of Rs. 1 crore per day or Rs. 300 crores per annum for all the subsequent years. This is the figure of production/sales.

(b) Para 2.5.5 of the report in which restructuring of the loans and infusion of adequate working capital into the system was recommended. These may come from not only the banking system, but also from the promoters. It was recommended that the management may try to bring back the morale of the employees so that the projected level of operation is achieved.

(c) Para 2.6.2 in which the reasons for strained relations between the respondent and Navistar, USA, a leading commercial vehicle manufacturer have been traced. It was noted that for certain reasons Navistar did not pick up the materials after June/July, 2011 and the stock transferred to their research and development division resulted in substantial blockage of funds. These stocks were valued at Rs. 28 crores. The report further refers to the filing of a suit in November, 2012 by the respondent against the US company in the US Court. It is stated that the respondent is hopeful of getting a favour verdict or an out of Court settlement.

(d) Para 4.2.4 where it is observed that the future projection for 91/2 years (FY 2013 to FY 2022) shows that the company should turn around within the next one year and perform quite satisfactorily. This observation is based on the projected figures given in para 4.2.3.

6. The learned counsel for the respondent also drew my attention to the following in the compilation:

(a) Letter dated 29th April, 2012 written by Rajasthan State Industrial Development and Investment Corporation Ltd., an undertaking of the Government of Rajasthan, to the respondent wherein the said corporation agreed to the request of the respondent for creation of a second charge in favour of the consortium of banks led by State Bank of Travancore, New Delhi over the fixed assets of the company in its unit at Kahrani, Bhiwadi.

(b) Letter dated 28.3.2013 written by Deutsche Invitations confirming the restructuring package of the working capital lenders which was sanctioned by the consortium of banks for shifting the manufacturing facilities of the respondent-company from Faridabad to Bhiwadi.

(c) Minutes of the lenders meeting held on 11.7.2013 in which it was recorded that the working capital lenders advised the respondent-company that the request to the working capital lenders for release of enhanced working capital limits sanctioned in the restructuring package will be examined in August, 2013, at the time of appointment of second installment to the labour based on the status of shifting raw material to Bhiwadi. Attention was also drawn to the

decision taken in the meeting that no legal or DRT action is presently being contemplated by the lenders "as the company is showing signs of improving level of operations. Banks agreed not to take coercive action and give a fair opportunity to the company to perform after such long-drawn labour problems". It was decided to have another meeting of the consortium banks in the middle of August, 2013 at Bhiwadi plant. Two of the lenders i.e. RIICO and DEG agreed to consider rescheduling of the outstanding loans in September, 2013 when a clear position about the operation of the respondent-company is available and to maintain parity with banks regarding payment of due interest.

7. The learned counsel for the respondent-company also drew my attention to the valuation of the property of the respondent-company in Ahmedabad at Rs. 450 lakhs. It is submitted that this property was offered to the petitioner as security for the outstanding amount, but the offer was rejected by the petitioner. It is further submitted that for the time being the property at Ahmedabad can be retained as security by the petitioner and if the amount which is outstanding is not paid to the petitioner by 31.3.2014, the respondent was agreeable to the property being sold in realisation of the arrears. It was also claimed that by 30.11.2013, the consortium of banks had agreed to pump in a sum of Rs. 7.74 crores as working capital into the respondent-company. The learned counsel further contended that all other creditors of the respondent-company are extending their co-operation and it is only the petitioner who is insisting that the respondent-company should be wound up. This position adopted by the petitioner, according to the learned counsel for the respondent, is opposed to the well-settled principles regarding winding up of a company. It is pointed out that winding up of a company should be the last resort and should be resorted to only when all attempts of revival of the company have failed.

8. In his rejoinder, the learned counsel for the petitioner fairly agreed with the statement of law that the Company Court will not be in a hurry to wind up the company and will adopt such a course only as a last resort, but submitted the following points for consideration:

- (a) the respondent did not place the above facts before the commencement of the hearing;
- (b) the filing of the compilation was a surprise; in any case there is no affidavit in support of the compilation;
- (c) the respondent-company does not appear to take the debts seriously as shown by its conduct, and it has not come clean in the proceedings before this Court;
- (d) though the respondent has brought to the notice of this Court and relied upon the minutes of the lenders' meeting held on 11.7.2013, there is no information supplied to the Court as to what were the developments in the month of August, 2013 when the request for enhanced working capital limits was supposed to be examined by the working capital lenders. There is also no

information placed before the Court as to what happened in September, 2013 when RIICO and DEG were supposed to consider the rescheduling of the outstanding loans;

(e) the e-mail dated 5.11.2013 sent by State Bank of Travencore to all the members of consortium of banks was only a request to the banks to provide the details of the interest outstanding as on 31.3.2013 and for the period April to October, 2013 in order to enable consideration of the request of the respondent-company for reworking of the restructuring package. It only shows that the respondent was not able to meet the conditions imposed for consideration of the restructuring package and nothing more;

(f) the respondent-company has also not informed the Court as to the progress made pursuant to the letter dated 28.3.2013 written by Deutsche Invitations in connection with the implementation of the restructuring package. There were several conditions for the implementation and no information has been placed by the respondent-company before this Court as to whether those conditions have been met or not; and

(g) if the respondent-company is really serious in paying off the debt due to the petitioner, it can sell the property at Ahmedabad which is valued at Rs. 450 lakhs and pay the amount due to the petitioner.

9. I have carefully considered the facts of the case in the light of the rival submissions. By order dated 2.9.2013, the winding up petition was admitted, but further proceedings such as citation in the newspapers and the appointment of provisional liquidator were deferred for a period of 8 weeks. It was stated in the order that this was "only to enable the talks or settlement proposals, if any, for which the initiative should be taken by the respondent-company. In case nothing happens at the end of 8 week period, the law has to take its own course". It is nobody's case that the respondent-company initiated any talks or settlement proposals at any time after the passing of the aforesaid order and before the winding up petition was taken up for hearing on 12.11.2013. In these circumstances, the question to be considered is whether the petition should be advertised and/or a provisional liquidator has to be appointed.

10. Before the winding up petition can be placed for hearing (after admission) before the Company Court, the petition has to be advertised in terms of Rule 24 of the Company Court Rules, 1959. A Division Bench of this Court, in Lt. Col. R.K. Saxena Vs. Imperial Forestry Corporation Ltd., Official Liquidator, held that the requirement that the petition must be advertised cannot be dispensed with by the company judge, but it is open to him to exercise his discretion in respect of the time limit for advertisement. According to the Division Bench, the discretion was relatable only to that part of the rule which says "be advertised not less than 14 days before the date fixed for hearing". The Division Bench further held that there is no scope for exercising the inherent jurisdiction of dispensing with the requirement that the petition must be advertised. It is true that in National

Conduits (P) Ltd. Vs. S.S. Arora, Supreme Court held that the Company Court has the power to entertain an application from the company that the petition be not advertised in the interest of justice or to prevent abuse of the process of the Court. However, there is no such application filed by the company in the present case. It is common knowledge that admission of a winding up petition and advertisement thereof involve serious consequences to the company, its members and shareholders. The interest of the company and the shareholders, members and creditors as a whole is one of the considerations that will have to weigh with the Company Court. Rule 96 of the Company Court Rules which appears in Part III titled "winding-up" states that upon filing of a winding up petition it shall be posted before the Judge in chambers for admission of the petition and fixing a date for the hearing thereof, "and for directions as to the advertisement to be published". This rule however applies only where the winding up petition is yet to be admitted. When once the winding up petition is admitted, the proceedings as to advertisement of the petition are governed by Rule 24. The Madras High Court however appears to have taken the view that advertising the petition immediately on the admission of the same would result in a serious loss and injury to the company and would be contrary to the plain terms of Rule 96 [ Nephc Micon Limited, 36, Wallajah Road, Chennai-2 and another Vs. Hindustan Thompson Associates Ltd., Chennai-105, ].

11. The remedy u/s 433(e) is not a matter of right; it only enables and empowers the Company Court to pass an order of winding up in an appropriate case. The Court is not bound to order winding up. The inability on the part of the company to pay the debt may arise for a variety of reasons and the Court is obliged to consider whether it is the outcome of any deliberate or designed action, or mere temporary shock and effect of economy upon the market. In a given case, it may happen that a company may become unable to pay its debts for a while but that by itself is not a criterion to wind up the company. The Company Court is under a duty to consider the financial status, strength and substratum of the company in an overall context and should be able to distinguish between a temporary cash crunch and a state of affairs which clearly indicates that the company has fallen sick without any hopes of revival. High sales and turnover are not necessarily an indication of cash surplus, if the liabilities of the company are also on the high side. It must be remembered by the Company Court that the effect of winding up is to put an end to the company which may lead to loss of jobs and loss of production which in turn may affect the larger interest of the company and the society in general. At the same time the inability to pay the debt in terms of section 433(e) read with section 434(1) (a) would raise a presumption, which is rebuttable, on the basis of material and evidence adduced by the company. The adequacy or sufficiency of such material or evidence would depend on the facts and circumstances of each case. This is the gist of the observations of the Gujarat High Court in Tata Iron and Steel Co. Vs. Micro Forge (India) Ltd., .

12. In the light of the aforesaid observations I proceed to examine the material

adduced before me by the respondent. In the order passed by me on 2.9.2013, it was noticed from the balance sheet as on 31.3.2012 and the unaudited financial results for the quarter ended 30.6.2013 that the sales of the company had fallen drastically. It was however observed by me that this could be due to the shifting of the operations, compelled by labour trouble, from Faridabad to Bhiwadi. The company has been supplying automobile clutches to TATA Motors since 1974. Sympathising with the respondent-company on account of the situation in which it was placed because of labour trouble and noticing the revival attempts by shifting the factory to Bhiwadi, I had observed that in this background the audited and unaudited financial statements did not present such a dismal picture as on date; at the same time I observed that the petitioner cannot wait forever for the payment of the dues. In order to enable talks between the parties and to facilitate any settlement proposals, I deferred the appointment of the provisional liquidator and the publication of the citation in the newspapers and the gazette for a period of 8 weeks, making it clear at the same time that the initiative for the talks should come from the respondent-company. It would appear that nothing worthwhile has taken place after the aforesaid order till the hearing of this petition on 12.11.2013. It is true that in the compilation filed by the learned counsel for the respondent on 12.11.2013, there is reference to some correspondence between the company and the State Bank of Travancore, which is the lead bank in the consortium of banks, and between the company and Deutsche Invitations in connection with certain loan agreements. However, apart from the reference to the minutes of the lenders' meeting held on 11.7.2013, no further information was forthcoming as regards the developments in the month of August, 2013. It may be recalled that in the lender's meeting held on 11.7.2013 at the conference hall of the Karol Bagh branch of State Bank of Travancore, the agenda was, inter alia, to discuss the current performance of the company and the current status of transfer of raw material and other machines to Bhiwadi. As regards the current performance of the company, the Chairman and Managing Director of the company informed the lead bank that-

- (a) an agreement has been signed with the labourers for settlement of the issues of pending remuneration;
- (b) the lenders were informed that once the company started payment in terms of the agreement, the labourers will not impede the transportation of the plant and machinery from Faridabad to Bhiwadi;
- (c) there were no dues on account of provident fund, but there were dues of about Rs. 15 crore towards sales tax which was to be paid in instalments;
- (d) the dues towards excise duty amounted to Rs. 3 crore plus interest which was to be cleared by March, 2014;
- (e) on account of acquisition of 3,000 sq.m. and the proposal to put up the metro station adjacent to the factory, the commercial value of the land would increase manifold.

Pointing out these circumstances, the Chairman and Managing Director of the company had requested the lenders for working capital mainly to arrange for the settlement of the workers, arrangement for transport of the raw materials and machinery and to increase the level of operations at Bhiwadi from Rs. 10 lakhs per day to Rs. 80 lakhs per day in the coming three months.

13. The minutes also record the fact that the AGM of the State Bank of India had observed in the meeting that the settlement with the workers itself would a big step to start with and once the company shifts the inventory to Bhiwadi and starts producing clutches of the value of Rs. 80 lakhs per day, the much needed liquidity will start. He recommended that the State Bank of Travancore, State Bank of India and Canara Bank which had sanctioned enhanced working capital limits under the restructuring package should consider releasing it for payment of the first instalment to labour. This suggestion was accepted and the banks agreed that they would approach their respective sanctioning authorities for release of these funds and in the meanwhile, the company should arrange funds to meet the timeline of payment and start shifting the inventory to Bhiwadi. The banks agreed that they will release the working capital as soon as they got the approval.

14. The representatives from the other lenders (non-banks) i.e. RIICO and DEG who were also present in the meeting took note of the decision of the working capital lenders (the banks) and would appear to have appreciated the same. At this juncture the Chairman and Managing Director of the company requested the banks to release the enhanced working capital limits as per the restructuring package. The working capital lenders however advised the company that this request will be examined in August, 2013, at the time of payment of the second instalment to the labour based on the status of shifting of the raw material to Bhiwadi and after evaluating the status of the level of operations at Bhiwadi. There is no information placed by the company before me as to what happened in August, 2013 - whether the second instalment was paid to the labour and whether the request to the banks for release of enhanced working capital limits was examined by them, and if so, what was their response.

15. Another important decision taken in the meeting of the lenders was that no legal or debt-recovery action was presently being contemplated by the lenders "as the company is showing signs of meeting level of operations. Banks agreed not to take coercive action and give a fair opportunity to the company to perform after such long drawn labour problems".

16. The minutes also record that the non-bank lenders i.e. RIICO and DEG agreed to consider rescheduling of the outstanding loans during September, 2013 when a clear position about operations would be available and maintain parity with the banks regarding payment of due interest. No information was placed before me as to the developments in September, 2013.

17. The only development after the last order, which was brought to my notice,

was the e-mail sent by State Bank of Travancore to the other banks which were members of the consortium on the subject "rework of the existing restructuring package". It merely states that the company's request for reworking the restructuring package due to delay in implementation of the package by the lenders is to be considered and therefore the banks may provide the details of the outstanding interest as on 31.3.2013 and 31.10.2013, due from the company.

18. The position therefore remains more or less the same as it remained in September, 2013 when the order for admission was passed by this Court.

19. The other alternative submission of the learned counsel for the respondent-company was that the company owned industrial sheds with plant and machinery at Ahmedabad which was valued at Rs. 450 lakhs and the same can be given as security to the petitioner and if the respondent is unable to clear the amount due to the petitioner by the end of March, 2014, the petitioner can realise the property and appropriate the proceeds in satisfaction of the debt.

20. From what has been stated above it appears to me, in the absence of any information placed by the company as to the developments, if any, which took place in August and September, 2013 pursuant to the decisions taken in the meeting held on 11.7.2013, that there are problems and impediments which continue to delay the process of revival and the shifting of the plant to Bhiwadi and in settling the dues of the labourers at Faridabad. No details or documents are placed before me to show that the labourers are being paid in terms of the settlement agreement entered into with them and there is no material brought on record to show the progress in the shifting of the plant to Bhiwadi. In these circumstances, the reliance placed on the techno-economic viability report prepared by Sonalal Dutta in December 2012 and the developments which took place prior to August, 2013 do not take the case of the respondent any further. More significantly, the respondent-company did not take the initiative to have talks or make settlement proposals to the petitioner despite the order dated 2.9.2013 making a clear reference to the same and making it the main ground for deferring the proceedings for a period of 8 weeks. The amount payable to the petitioner is outstanding for quite some time. No initiative appears to have been taken by the respondent-company even after the passing of the order by this Court on 2.9.2013. I am therefore left with no other option but to direct publication of the citation in the Delhi Gazette, Times of India (English) and Navbharat Times (Hindi) that the winding up petition against the respondent-company has been admitted.

21. However, I cannot also lose sight of the fact that publication of the citation that the winding up petition against the company has been admitted is likely to have an adverse impact in the restructuring proposals/proceedings which are under consideration by the consortium of banks and on the labourers who are awaiting settlement, having assured the company that they will not hamper the process of shifting the factory to Bhiwadi. It is significant to note that the banks took a decision not to take any legal steps or action in the Debt Recovery

Tribunal against the company as the company is showing signs of meeting the level of operations. Though there is no information as to what happened in August and September, 2013 about the progress of the restructuring proposal, there is also no information to the effect that the restructuring proposal has been terminated or dropped. If the proposals are still under consideration and for some reason or other have merely been deferred to a future date beyond September, 2013 and are still alive, an immediate advertisement of the admission of the petition would cause damage to the prospects of the company vis-a-vis the restructuring package. On the facts of the present case and by virtue of the powers vested in me under Rule 9 of the Company Court Rules, 1959, I am of the view that it would be appropriate to advertise the admission of the winding up petition in the Delhi Gazette and the newspapers mentioned above on 14th February, 2014, making it clear in the advertisement that a provisional liquidator is yet to be appointed.

22. I have consciously deferred the appointment of a provisional liquidator. This will be taken up for consideration, if necessary and if the situation so demands, on the next date of hearing. List on 5th March, 2014.