
(2010) 04 CAL CK 0040
In the Calcutta High Court
Case No : CP No. 316 of 2008

Xenitis Infotech Pvt. Ltd.

APPELLANT

Vs

Swarna Sathi Dealers Pvt. Ltd.

RESPONDENT

Date of Decision : 01-04-2010

Acts Referred:

Companies Act, 1956 — Section 293(1), 434

Citation : (2010) 2 CALLT 397 : (2010) 155 CompCas 330

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : P.C. Sen, R.K. Khanna and Manju Bhutoria, for the Appellant; Jishnu Saha and K. Shah, for the Respondent

Judgement

Sanjib Banerjee, J.—The substance of the claim in both petitions is the same, only the petitioners and the details are different. The parties have submitted that a judgment on the one will cover the other matter. The claim in either case is on account of alleged inter-corporate deposits made by the petitioner with the common company and the alleged failure of the company to repay the same. The details in this judgment are those covered by CP No. 316 of 2008.

2. In addition to the affidavit-in-opposition and affidavit-in-reply filed in either case, the petitioner obtained leave to use a supplementary affidavit. The company was permitted to use a rejoinder, but the rejoinder was to be limited to the statements contained in the supplementary affidavit filed by the petitioner. The order dated February 1, 2010 did not permit the company to include any material beyond dealing with the supplementary affidavit and enclosing copies of documents referred to in the opposition.

3. The petitioner in CP No. 316 of 2008 claims that inter-corporate deposits were made during the financial year 2006-07 of a total amount of Rs. 4. 18 crore. The petitioner suggests that the deposits were to carry interest at the rate of 10 per cent per annum. The singular feature of the claim in either case is that there was no document exchanged between the parties at the time that the alleged inter-

corporate deposits were made and there is no written agreement as to interest or the quantum thereof. The petition in either case contains only the statutory notice as the annexure thereto. In either case the company did not respond to the statutory notice despite due receipt thereof. It is such fact that the petitioner in either case cites in asserting the claim and insisting that upon the company failing to reply to the statutory notice the presumption u/s 434 of the Companies Act, 1956 had inarguably arisen in favour of the petitioner.

4. In the affidavit, the company has denied the claim. The stand taken by the company at paragraph 6 of the affidavit is that there was a "concurrent transaction" in every case. The company sought leave to produce the relevant bank accounts to demonstrate such "concurrent transactions." The company says that it has disclosed the bank accounts in the rejoinder to the supplementary affidavit and it would be evident from the bank transactions that almost simultaneously with the receipt of every payment from the petitioner, the company had passed on the equivalent amount to another entity. In the case of a solitary transaction, the company has sought to demonstrate that shortly after it received the payment from the petitioner, it passed it on to concerns by the names of Computech and Compact Disc India which, in turn, made payment to Mrigiya Electronic Industries Pvt. Ltd, which, according to the company, is a concern owned, managed and controlled by the same persons who are in management of the petitioner company. The essence of the company's defence is that the payments shown to have been received by the company from the petitioner were mere book entries and the monies were never retained by the company but rolled out almost simultaneously to other entities. The company has denied that the transaction was one of inter-corporate deposits made by the petitioner or that the company was liable to pay any interest.

5. Before the other arguments made on behalf of the parties are taken up it is necessary that the circumstances in which the transaction came to be executed as asserted by the petitioner and the company be noticed. The relevant extracts from paragraph 6 of the petition and paragraph 6 of the company's affidavit bring out the conflicting positions:

6. In or about June, 2006, the Company acting through the instrumentality of its Director Mr. Santanu Ghosh and Smt. Mamta Binani, a practicing Company Secretary of No. 2A, Ganesh Chandra Avenue, Commerce House, Room No. 6, 4th Floor, Kolkata approached the petitioner acting through the instrumentality of its Director Mr. Mahesh Kedia for Inter Corporate Deposit (hereinafter referred to as "ICD") of sums not exceeding Rs. 5,00,00,000/- (Rupees five crores) only to be given in such sum or sums of money having regard to the Company's exigency of business and on representation that such borrowing by the Company is within the provisions of Section 293(1)(d) of the Companies Act, 1956 whereupon it was orally agreed by and between the parties hereto that the petitioner will arrange and make Inter Corporate deposit (hereinafter referred to as "ICD") for Company sums not exceeding Rs. 5,00,00,000/- (Rupees five

crores) only to be given in such sum or sums of money having regard to the Company's exigency of business and carrying interest @ 10% per annum." (Paragraph 6 of the petition)

6. ...The entire transaction was arranged by and at the instance of Mamta Binani, who is associated both with the petitioner and the company as also various other concerns including Ujjwal Trafin Pvt. Ltd., Computech and Compact Disc India and had caused several transactions including once referred to in the instant petition to be entered into by and between the said parties and the company. ... The company shall crave reference to its own bank's statements to evidence concurrent transactions between the company and the petitioner, Ujjwal Trafin Pvt. Limited, Computech and Compact Disc India, which will clearly show that in any event, no sums were liable to be repaid by the company to the petitioner." (From paragraph 6 of the affidavit-in-opposition)

6. According to the petitioner an amount of Rs. 30 lakh was deposited with the company on June 19, 2006 and the last deposit was one of Rs. 20 lakh on November 7, 2006. The details of the cheques appearing at paragraph 7 of the petition indicate that 28 cheques were used from the same cheque-book bearing numbers 573507 to 573548 with a few gaps in between. The last two amounts, of Rs. 11 lakh and Rs. 20 lakh paid on November 1, 2006 and November 7, 2006, respectively, were paid by cheques bearing successive numbers issued from another cheque-book. The petitioner claims that despite repeated requests and reminders, the company failed to pay the amount due to the petitioner save a sum of Rs. 10 lakh on account of interest tendered on May 13, 2008. The petitioner has claimed a sum of Rs. 4,93,30,833/- together with interest at the rate of 10 per cent per annum on the principal sum of Rs. 4. 18 crore.

7. In the statutory notice of August 7, 2008 the schedule of alleged inter-corporate deposits has been detailed. The company duly received such notice but did not respond thereto.

8. The petitioner says that the balance sheet of the petitioner for the year ended March 31, 2008 reflects, in the relevant schedule, the loan of Rs. 4.18 crore given to the company. The company has relied on the balance sheet of the petitioner for year ended March 31, 2007 where, though unsecured loans and advances of Rs. 4,24,86,768/- have been shown, there is no schedule to such balance sheet identifying the entities to which the petitioner had made the loans and advances available. The point is of some significance since it cannot be lost sight of that the balance sheet of the petitioner for the year ended March 31, 2008 was prepared on August 29, 2008, some three weeks after the statutory notice had been issued to the company.

9. In addition to the defence of "concurrent transaction" (which is a rather intrepid euphemism for the "jama-kharchhi" that is so brazenly prevalent in the commercial circuit but mentioned only in hushed tones in official circles), the company has relied on two documents in the company's bid to show that it was

the petitioner who had instructed the company to make payment of the amounts due from the company to the petitioner to another concern. In CP No. 316 of 2008 such other concern is Clarion Overseas (India) Private Ltd and in CP No. 315 of 2008 such other concern is Ujjwal Trafin Private Ltd.

10. The petitioner in either case insists that these documents which have been relied upon in the company's affidavits have been manufactured and brought into existence for the purpose of the present proceedings and should not be given any credence. The petitioner says that if such letters were, indeed, issued in the year 2007 as the company claims, there would have been no occasion for the company to make payment of a sum of Rs. 10 lakh which the company made to the petitioner in CP No. 316 of 2008 on May 13, 2008. The petitioner submits that the documents appear to have been fabricated. The petitioner has relied on copies of the statutory records and documents relating to Clarion Overseas (India) Private Ltd and seeks to demonstrate that Santanu Ghosh, who is the principal person in control of the company, is also the principal person in control of Clarion. The petitioner says that the company should have at least demonstrated that it had made the payment to Clarion following the alleged request contained in the documents relied upon in CP No. 316 of 2008. The petitioner seeks to deny the rubber stamp and letter-heads relating to the two documents disclosed in the company's affidavit, but it does not appear from the affidavit-in-reply used by the petitioner that such aspects of the documents have been specifically questioned therein though the petitioner has, doubtless, challenged the veracity of the documents.

11. It is the petitioner's contention that since the company did not reply to the statutory despite due receipt thereof there is now a presumption of the company's inability to pay and the onus of establishing that there is no debt due is solely the company's and the petitioner is no longer required to affirmatively establish its claim. To boot, the petitioner asserts that the company has not denied receipt of the amounts claimed in the petitions but has only sought to deny its liability to pay on the ruse that the money has been passed on; whether or not at the behest of the petitioner. The petitioner states that the stand taken by the company in the rejoinder to the supplementary affidavit utterly demolishes the stand taken in the affidavit-in-opposition. The petitioner claims that in accordance with the established principles in this jurisdiction the court should delve in to the merits of the defence and assess whether an arguable case has been made out by the company.

12. The petitioner refers to a well-known judgment of a Division Bench reported at *Bangasri Ice and Cold Storage Ltd. Vs. Kali Charan Banerjee*, . The petitioner relies on the principle recognised therein that it will not do for the company to deny a claim recklessly; the company court is entitled to investigate the question as to whether a dispute has been manufactured in order to delay and defeat the realisation of the dues of the petitioning creditor and is merely a cloak for the inability of the company to pay its just debts.

13. The petitioner has also referred to a judgment reported at (1983) 54 Comp Cas 41 (Smt. Madan Debi Kundalia v. Alpine Dairy Ltd.) where the company court saw through a document that had been put up to deny the claim and concluded that it was a manufactured document.

14. At the hearing, the company has not stressed so much on the documents that it referred to in its original affidavits filed in the two matters. The company has instead relied on its positive assertion in the affidavit that there was a series of "concurrent transactions." The company says that it has produced some material in its rejoinder to the supplementary affidavit in support of such defence which would undo the presumption that may have arisen on the company's failure to reply to the statutory notice. At pages 82 and 83 of the rejoinder in CP No. 316 of 2008, the company has detailed the payments received from the two petitioners and the almost simultaneous pay-out of an equivalent amount by the company in most cases. The pay-outs have been made in favour of concerns by the name of Computech and Compact Disc India. At pages 99 to 104 of the rejoinder, the company has relied on the bank statement of Computech. At pages 105 to 107 of the rejoinder the company has relied on the bank statement of Mrigiya Electronic Industries Pvt. Ltd. Interestingly, the status of Computech in the bank statement reads "relationship customer - father" and the status of Mrigiya in its bank statement reads "relationship customer - child." The company seeks to establish that in at least one case there was a payment made by the petitioner to the company which was passed on by the company to Computech which was immediately parked in Mrigiya and, almost simultaneously, returned to the petitioner. The company says that it would be difficult to establish the chain in every case but since some evidence in support of the company's assertion of "concurrent transactions" has been brought, the company court should not disregard such defence and permit the company to carry the same to the more protracted proceedings that the petitioner should be directed to bring.

15. The company says that its accounts were window-dressed and, though there is no assertion to such effect in the pleadings, the company had intended to make a public issue of its shares at the relevant point of time and the transactions were merely to bolster its turnover leading upto the proposed issue. Counsel for the company submits that in making such submission and in attempting to bare the utterly illegal transaction in which the parties participated, the company was exposing itself to censure and penalties that may be imposed by the statutory authorities. Counsel submits that both petitioners here entered into an illegal agreement with the company and since the petitioners are party to an illegality, they should not be accorded the privilege of having their claims admitted in this equitable jurisdiction. In effect, the company invokes the maxim "in pari delicto potior est conditione defendantis". The company relies on a judgment reported at Sita Ram Vs. Radhabai and Others, and submits that the three exceptions to cases where the maxim applies would not be available to the petitioner in either case. The Supreme Court recognised the exceptions to be:

(a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it;

(b) where the plaintiff is not in *pari delicto* with the defendant; and, (c) where the plaintiff does not have to rely on the illegality to make out his claim.

16. There is no dispute that the monies claimed by the petitioner to have been paid to the company were, indeed, received by the company. Equally and more importantly, there is nothing that either petitioner has brought which would suggest that these were inter-corporate deposits made against consideration of receiving interest at the time of repayment. The paid-up capital of the petitioner company in CP No. 316 of 2008 at the end of financial year 2006-07 was Rs. 2,36,32,000/- and its reserves and surplus on account of security premium account was another Rs. 3, 15,90,000/-. As to its business apparent from its balance sheet for the relevant financial year, the petitioner had fixed assets in computers worth Rs. 20,910/- and investments in unquoted shares (four in private limited companies and four in unlisted public companies) of value of Rs. 1,30,41,750/-. The balance in its profit and loss account was the princely negative amount of Rs. 34,433.50. In the following financial year, the total income of the petitioner, as is evident from its profit and loss account, was Rs. 21,150/-. Its total expenditure was Rs. 47,534/- and the combined loss carried to its balance sheet was Rs. 63,4 18.50. The only investments of the petitioner additionally made in financial year 2007-08 were in shares of private limited companies as would appear from the first schedule to the balance sheet. For such a company as the petitioner making an inter-corporate deposit of Rs. 4.18 crore in course of a few months, notwithstanding its apparent paid-up capital and free reserves, appears to be somewhat unusual.

17. There is also no apparent logic in the petitioner making payment in dribblets. It is the petitioner's assertion that it agreed to provide money to the company "having regard to the company's exigency of business." It cannot be comprehended that the company had an exigency and required Rs. 30 lakh on June 19, 2006; another small hiccup that it required Rs. 5 lakh the following day; a further immediate need of Rs. 10 lakh on June 21, 2006; and, a major necessity for Rs. 25 lakh on June 22, 2006. Similarly, on July 31, 2006 payments have been made by the petitioner to the company from the same bank account in three tranches of Rs. 15 lakh, Rs. 15 lakh and Rs. 11.5 lakh. That was not a one-off remarkable instance. On August 8, 2006 the petitioner has made three payments of substantial amounts from the same bank account.

18. It is a rather incredible claim that the petitioner in either case has carried to an equitable jurisdiction. Inter-corporate deposits of sums as big as Rs. 4. 18 crore should ordinarily not be made without a scrap of paper being exchanged between the company and the depositor. It is possible that these petitioners were gullible enough to rely on the oral representations of the company personnel and parked such quantum of money in the hope of repayment with interest and without any hitch. It is just as possible that the company's disgusting version of

what transpired is established upon evidence being received. The company has made the submission as recorded here with full prejudice and with knowledge of the risks that it entails. If it is true, it exposes the dirty underbelly of Indian corporate functioning and the market watchdog and sentinels must be alerted. But whatever may be the consequences, the simple version of things that the petitioner in either case painted, appears to be a trifle short on details.

19. The claims of the petitioners are relegated to suits. That does not imply that the company's version has been accepted, but only that a triable issue has arisen upon the company claiming that the payments made by either petitioner were part of a series of concurrent transactions that these parties, with several others, had devised.

20. The two documents that the company has relied on in its original affidavit in either case do not appear to have been contemporaneously issued, though the letterheads and the rubber-stamps have not been specifically questioned by the petitioners in their affidavits-in-reply. The petitioners have alleged that these are manufactured documents and it is more than likely that they are so, but in the absence of the petitioners having denied the letterheads and the rubber-stamps, the veracity of such documents have to be tested in more protracted proceedings than is conveniently permissible in this summary jurisdiction.

21. CP No. 316 of 2008 and CP No. 315 of 2008 are permanently stayed. There will be no order as to costs. The Registrar, Original Side, will forward copies of this order to the Central Board of Director Taxes and the Chairman, Securities and Exchange Board of India, for such authorities to take whatever action that may be deemed fit on the basis of the submission recorded in this order.

22. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.