
(2016) 12 BOM CK 0067

In the Bombay High Court

Case No : Company Petition No. 380 of 2015

Zhejiang Medicines and Health Products

APPELLANT

Vs

Devanshi Impex Pvt. Ltd.

RESPONDENT

Date of Decision : 14-12-2016

Acts Referred:

Evidence Act, 1872 — Section 57, Section 85
Notaries Act, 1952 — Section 14

Citation : (2017) 2 BCR 576

Hon'ble Judges : S.C. Gupte, J.

Bench : Single Bench

Advocate : Mr. Shyam Kapadia, a/w. Mr. Darshan Mehta and Ms. Pooja Kane, i/b. Dhruve Liladhar & Co, for the Petitioner; Mr. Zal Andhyarujina, a/w. Ms. Akansha Agrawal and Mr. C.N. Mehta, i/b. MMK Law Associates, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Gupte, J.—This petition seeks winding up of the Respondent Company on the ground of inability to pay its debts. The Petitioner's debt arises out of a contract of sale of goods. The Petitioner claims to have sold, supplied and delivered goods described in the invoices annexed as Exhibits "B-1" to "B-3" to the petition. The aggregate invoice value works out to USD 574,640. There is no dispute between the parties as to either receipt of or quality of goods or correctness of the invoices. The Respondent has, in fact, by its mails dated 23 February 2013 and 29 March 2013, categorically admitted its liability to pay the outstanding amount of USD 534,678.80 to the Petitioner and assured payment respectively by March 2013 and April 2013. There is a failure to pay on the part of the Respondent. The statutory demand notice addressed by the Petitioner in respect of this debt is replied by the Respondent by its letter dated 30 December 2014. Once again, the Respondent categorically admits the responsibility to pay the amount but has pleaded temporary financial difficulties. In sum, there is no defence on merits voiced in the correspondence between the parties prior to the

filing of the petition. Indeed no defence was urged even at the hearing of the petition, save and except the defence as to the maintainability of the petition on account of the Petitioner's failure to verify the petition in accordance with law. That defence is discussed below.

2. The Petitioner is a body corporate. The petition has, however, not been verified by any director, secretary or principal officer of the Petitioner. The petition is verified by a constituted attorney. In support of the authority of the constituted attorney to verify the petition, the petition relies on a power of attorney. It is the case of the Respondent that this power of attorney, which is executed and notarized in People's Republic of China, is not valid in law or capable of being acted upon. The Respondent relies on Section 14 of the Notaries Act and submits that there is no notification by the Central Government declaring notarial acts lawfully done by Notaries within the People's Republic of China as recognised within India for the purpose of filing of a winding up petition. Learned Counsel for the Respondent relies on judgments of Calcutta, Allahabad and Kerala High Courts in support of his contention that in the absence of such notification, the power of attorney executed and notarized in China cannot be accepted as valid by this Court or acted upon. On the other hand, it is submitted by learned Counsel for the Petitioner that there is no need for a notification under Section 14 of the Notaries Act for this Court to accept the power of attorney or act upon the same. Learned Counsel relies on Sections 85 and 57 of the Indian Evidence Act, 1872 and submits that any document, which purports to be a power of attorney and to have been executed before and authenticated by a Notary Public, shall be presumed to be so executed and authenticated and further, the Court has to take judicial notice of seals of Notaries Public. It is submitted that Section 14 does not, in any way, control the interpretation of Section 85 read with Section 57 of the Evidence Act.

3. In the present case, the power of attorney is executed by the Petitioner, who is a body corporate, through its duly authorised officer. The officer has been authorised to execute such power of attorney by virtue of a resolution of the board of directors of the Petitioner Company passed on 2 September 2014. The Officer, so authorised, has on 17 September 2014 executed the power of attorney in favour of one Pankaj Sachdeva. The power of attorney specifically authorizes the constituted attorney to sign and verify all claims, including winding up petitions and pleadings in connection with the outstanding amount due from the Respondent along with overdue interest and costs, etc. There is a Company seal affixed unto the power of attorney and it is attested by Notary Public. A notarial certificate issued by Notary, Cui Hairong, Hangzhou National Notary Public Office, Zhejiang Province, the People's Republic of China, is appended to it. The constituted attorney has signed and verified the petition on the basis of this power of attorney.

4. Rule 21 of the Companies (Court) Rules, 1959 provides for verification of every petition by an affidavit made by the Petitioner or by one of the Petitioners,

where there are more than one, and in case the petition is presented by a body corporate, by a director, secretary or other principal officer thereof. The proviso to Rule 21 enables the Judge or Registrar for sufficient reason to grant leave to any other person duly authorised by the Petitioner to make and file the affidavit. The deponent of such affidavit in the present case is not a director, secretary or other principal officer of the Petitioner, who is a body corporate, but an authorised person. When the Registrar permitted the deponent of the affidavit to make and file the affidavit, he obviously granted leave to the deponent within the meaning of the proviso. The question urged before the Court is whether the deponent was duly authorised by the Petitioner to make and file such affidavit, for in the absence of such authority, there is no power in the Court or the Registrar to grant any leave to make or file the affidavit.

5. At the outset, it needs to be noted that authority to do something can be conferred in various modes. Power of attorney is not the only mode of conferring such authority. In fact, the requirement of a power of attorney to confer such authority is to be found only in the Registration Act, 1908. Section 32 of the Registration Act, 1908 requires that every document for registration under the Act must be presented by any of the persons named therein. One of the named persons is an agent of the person executing or claiming under the same, duly authorised by a power of attorney executed and authenticated in a manner mentioned in the Act. Section 33 provides for powers of attorney, which are recognisable for the purposes of Section 32. One of the recognised powers of attorney is a power of attorney executed before, or authenticated by, a Notary Public. Barring these special requirements, an authority can be created in different modes. Particularly, a corporate organization confers authority by its resolution. Authority may be created also by making of an affidavit. Inasmuch as there is no legal requirement for creation of an authority by a power of attorney executed before a Notary Public, we are not really concerned in this matter with the validity of the authority as such. This is particularly so since the authority is created in People's Republic of China and the question whether or not the authority was duly conferred or created has to be answered with reference to the law applicable in that country. No arguments were advanced in this behalf before me. Considering, however, that the authority in the present case is claimed on the basis of a duly executed power of attorney before a Notary Public in China, the question that we still need to answer is whether or not the Petitioner can rely on the particular power of attorney in evidence. It is only in that context that we need to consider the provisions of the Evidence Act and the Notaries Act cited before me.

6. Section 85 of the Evidence Act creates a legal presumption in favour of execution and authentication of a document purporting to be a power of attorney executed before, or authenticated by, a Notary Public. There are a number of judgments of different High Courts, which hold that Section 85 applies to powers of attorney executed before and authenticated by all Notaries and not necessarily Notaries defined under the Notaries Act, 1952. Delhi High Court in the case of

National and Grindlays Bank Ltd. v. M/s. World Science News and others AIR 1976 Delhi 263 Allahabad High Court in the case of Abdul Jabbar v. IInd Addl. District Judge, Orai AIR 1980 Allahabad 369 and Calcutta High Court in the case of in Re K.K. Ray (Private) Pvt. Ltd. AIR 1967 Calcutta 636 (V 54 C 136) have held so. Even the judgment of the Supreme Court in the case of Jugraj Singh v. Jaswant Singh, 1970 (2) Supreme Court Cases 386 suggests that a power of attorney executed before a Notary Public not covered by the Notaries Act, 1952 comes within the expression "Notary Public" under Section 85, though this case does not in terms deal with this question.

7. We also need to consider the effect of Section 57 of the Evidence Act, which requires the Court to take judicial notice of all seals of Notaries Public. Once again, these Notaries Public include Notaries operating in other countries as well and are not confined to Notaries under the Notaries Act, 1952.

8. Now the question is whether Section 14 of the Notaries Act, 1952, which is in the context of reciprocal arrangements for recognition of notarial acts done by foreign Notaries, in any way, controls the interpretation of Sections 85 or 57 of the Evidence Act. Section 14 provides that if the Central Government is satisfied that by the law or practise of any country or place outside India, the notarial acts done by Notaries in India are recognised for all or any limited purposes in that country or place, the Central Government may, by notification in the Official Gazette, declare that the notarial acts lawfully done by the Notaries within that country or place shall be recognised within India for all purposes or, as the case may be, for such limited purposes, as may be specified in the notification. Section 14 no doubt provides for a declaration by the Central Government of recognition within India of all notarial acts done by Notaries of a foreign country but does it imply that no other notarial acts, that is to say, except the acts so recognised by declaration by the Central government, are recognised in India. The query is more pertinent in the context of Sections 85 and 57 of the Evidence Act. In the first place, Sections 85 and 57 particularly deal with powers of attorneys executed before and authenticated by Notaries Public which are presumed to have been duly so executed and authenticated, with the seals of the notaries being judicially noticed, whereas Section 14 generally provides for recognition of "notarial acts". There is no reason why, as far as powers of attorney with notarial seals are concerned, we should not go by the provisions of Sections 85 and 57, which particularly deal with such matters, rather than the general provisions of Section 14 which bear on recognition of notarial acts generally. (There are various other notarial acts which fall for recognition within India.) For raising the statutory presumption, Sections 85 and 57 do not require any recognition of notarial acts of the country or place, as the case may be, where such power of attorney is executed or authenticated. Secondly, there is nothing in the language of Section 14, which requires that only those notarial acts, which are declared as recognised by the Central Government by notification in the Official Gazette, are to be recognised in India. Delhi High Court in the case of Rajesh Wadhwa v. Dr. (Mrs.) Sushma Govil, 37 (1989) DLT 88 dealt with this

aspect. The Court, after considering judgments of various courts in and outside India, came to hold that the provisions of Section 14 of the Notaries Act, 1952, do not create any bar in recognizing the notarial acts of such countries, which are not declared as recognised by a notification of the Central Government. Even the Allahabad High Court in Abdul Jabbar's case (*supra*) held that Section 85 of the Evidence Act applies equally to documents authenticated by Notaries Public of other countries and there is no reason to import the provisions of Notaries Act for interpreting the provisions of the Evidence Act. Another judgment of Delhi High Court in *La Chemise Lacoste v. Crocodile Indl. Pte. Ltd.* CS (OS) No.894/2001., holds that even though there might not be reciprocity between India and another country within the meaning of Section 14 of the Notaries Act, 1952, acts of Notaries in that foreign country could be given legal recognition by courts and authorities in India. The notification under Section 14 of the Notaries Act, in other words, is not held to be mandatory. I am respectfully inclined to agree with these views of Delhi and Allahabad High Courts.

9. Mr. Andhyarujina, learned Counsel for the Respondent, referred to the cases of Calcutta High Court in *REI Agro Ltd. v. UBS AG*, 2015 (SCC Online 2557 and *Chandra proteco Ltd. v. Hopgoodganim*, 2015 SCC Online Cal 5690 as also the judgment of Allahabad High Court in *Tayal Potteries v. Macroplast (P.) Ltd.* 1998 SCC Online All 1126 in support of his case that in the absence of recognition of reciprocity as contemplated under Section 14 of the Notaries Act, unilateral recognition of notarial acts done by a foreign Notary by an Indian Court is impermissible. In the first place, the judgment of the Calcutta High Court in the case of *REI Agro Ltd.* (*supra*) curiously does not refer to the earlier judgment of that Court in the case of *Re K.K. Ray Pvt. Ltd.* (*supra*). In that case, after an elaborate discussion on the various provisions of law, which bear on the subject, a learned Single Judge of Calcutta High Court had come to a conclusion that notification under Section 14 of the Notaries Act recognizing reciprocity of notarial acts was not a legal requirement for recognizing a power of attorney in India. Besides, none of the two judgments of Calcutta High Court cited by Mr. Andhyarujina discusses the existing law on the subject, particularly on the interpretation of Section 85 of the Evidence Act, as noted by several other High Courts as I have indicated above. These two judgments rather approach the subject on a first principle basis. The judgments do not elaborate on why recognition by Indian Courts is impermissible in the absence of recognition of reciprocity as contemplated under Section 14 of the Notaries Act. The only reason, broadly stated, is that "if it is otherwise, the sanctity of the sovereign power being exercised by an Indian Court will be compromised". One is at a loss to understand why it should be so. After all, it is by law made by the Indian legislature, namely, Section 85 of the Evidence Act, that the Indian Courts recognise all powers of attorney led in evidence in India. The judgment of Allahabad High Court cited by Mr. Andhyarujina does not deal with a power of attorney in connection with verification of a petition. The authority to verify the petition was claimed in that case by a "pairokar", who was said to be "well

acquainted with the facts deposed to below." The Court found that the affidavit filed by this "pairokar" nowhere stated that the said person was duly authorised by the petitioners to file the affidavit in support of the petition. The facts in that case are, thus, clearly distinguishable.

10. Mr. Andhyarujina, learned Counsel for the Respondent, also submitted that unlike in the case of *Re K.K. Ray Pvt. Ltd.*, where the Court in fact had material before it to find a factual reciprocity between notarial acts in US and India, there is no such factual material available in the present case. I am afraid I cannot accept this argument from the Respondent. It is, firstly, for the Respondent to aver that there is no such factual reciprocity. In the absence of such plea from the Respondent, the Petitioner cannot be required to prove factual reciprocity. Secondly, I have held as a matter of law that Section 14 of the Notaries Act, 1952 has no bearing on the construction to be put on Section 85 of the Evidence Act, in which case factual reciprocity of notarial acts is quite besides the point.

11. In the premises, I find no merit in the contention of Mr. Andhyarujina. As I have noticed above, apart from this legal contention, there is no other defence to the petition on merits.

12. Accordingly, the following order is passed:

- (i) The Company Petition is admitted and made returnable on 20 February 2017;
- (ii) The Petitioner is directed to advertise the Petition in two local newspapers, viz. "Free Press Journal" (in English) and "NavShakti" (in Marathi) and also in Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette, and any resultant inadequacy of the notice shall not invalidate such advertisement or notice and shall not constitute noncompliance with this direction or with the Companies (Court) Rules, 1959;
- (iii) The Petitioner shall deposit an amount of Rs.10,000/- with the Prothonotary and Senior Master of this Court towards the publication charges, within a period of two weeks from the date of this order, with intimation to the Company Registrar, failing which the Petition shall stand dismissed for non prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to the Petitioner;
- (iv) A copy of this order shall forthwith be served on the Company by hand delivery and by Registered Post AD by the Advocate for the Petitioner.

13. On the application of Mr. Andhyarujina, learned Counsel for the Respondent, the Petitioner is directed not to advertise the petition for a period of four weeks from today.

14. It is agreed between Counsel for both sides that the facts as well as the solitary contention in the companion petition, namely, Company Petition No.751 of 2015, are similar to the petition discussed above and would go by the same reasoning. Accordingly, for the reasons so stated, Company Petition No.751 of

2015 is also admitted and made returnable on the same date. Advertisement of the petition is, however, dispensed with, in view of the advertisement ordered in the companion petition.