

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on: 25th July, 2013*
Date of Decision: 30th July, 2013

+ CO. PET. No.350/2010 & CO. APPL. No.1590/2010

M/S SICPA INDIA PRIVATE LTD. Petitioner
Through: Mr.C. Mukund, Mr.Ashok
Kumar Jain, Mr.Pankaj Jain
& Mr. P.V. Saravanaraja,
Advocates.

Versus

M/S BRUSHMAN (INDIA) LTD. Respondent
Through: Mr.Lakshmi Gurung &
Mr.Sujeet Kumar, Advocates.

CORAM:
MR. JUSTICE R.V. EASWAR

JUDGMENT

R.V. EASWAR, J.:

This is a petition filed under sections 433(e), 434 and 439 of the Companies Act, 1956 (“the Act”) filed by SICPA India Pvt. Ltd. (“the petitioner”) seeking winding-up of Brushman (India) Ltd., hereinafter referred to as the “respondent” or the “respondent-company”.

2. The petition has been filed under the following circumstances. The petitioner advanced a loan of ₹3 crores in July, 2008 to the respondent against the pledge of shares worth ₹5.50 crores. The shares belonged to the promoters of the respondent-company. Another loan of ₹5 crores was given for a period of three months in August, 2008, which was sought to be rolled over in October, 2008. A request was also made by the respondent seeking time to repay the earlier loan of ₹3 crores. It would appear that the market value of the shares pledged as security for the loan of ₹3 crores fell; so, more shares were pledged, whose value amounted to ₹7,03,125. After a series of extensions or rolling-over of the loans, the respondent repaid the loan of ₹3 crores on 27-2-2009 and on the same date again sought rolling-over of the loan of ₹5 crores. In the meantime, the value of the pledged shares had further fallen; the petitioner therefore requested the respondent to pledge more shares to cover the amount of the loan. In the event, 18,75,000 shares belonging to the promoters of the respondent-company were pledged to cover the loan of ₹5 crores and the interest thereon.

3. The grant of the loan of ₹5 crores against the pledge of shares was supported by a loan agreement dated 27-8-2008. It was on this day that the shares were initially pledged.

4. Between 7-8-2009 and 2-9-2009, apparently frustrated by repeated requests from the respondent-company for roll-over of the loan, the petitioner transferred the pledged shares to its own DEMAT account in the following manner:

Date of Transfer	No. of shares	Price of each share Rs.	Amount Rs.
7.8.2009	5,50,000	13.40	73,70,000
7.8.2009	7,50,000	13.40	1,00,50,000
10.8.2009	1,50,000	13.35	20,02,500
2.9.2009	3,00,000	16.85	50,55,000
2.9.2009	1,25,000	16.85	21,06,250
Total	18,75,000		2,65,83,750

5. On 22-10-2009, the petitioner wrote to the respondent-company stating that it did not receive any notice of the annual general meeting held by the respondent-company on 30-9-2009, in which the annual accounts were considered and adopted and asked for an explanation from the company as to why the notice was not sent to it. It was further stated in the letter that the petitioner came to understand from the BSE site that a board meeting of the respondent-company had been held on

20-10-2009 in which the matter relating to the further fund-raising by way of issuance of GDRs was discussed. Finally, the letter contained a “notice” to the respondent-company that (i) notice of the EGM to be held shall be sent to it well in time and that (ii) the petitioner proposed *“to nominate a person of our choice on the Board of your Company”*. It was also stated that if no reply is received within seven days, the petitioner would approach the SEBI.

6. Between March and May, 2010, the petitioner sold 18,74,000 pledged shares, retaining 1000 shares, and realised a sum of ₹1,69,95,042. The market value of the shares as on 31-5-2010, according to the petitioner, was ₹7.79 per share. Thus the petitioner gave credit for ₹1,70,02,832 to the respondent and calculated the balance due from the respondent at ₹4,93,17,156, including interest.

7. In accordance with the above calculations, the petitioner sent the statutory notice u/s. 434(1)(a) to the respondent on 1-6-2010 demanding the aforesaid amount and intimating that if the amount is not paid within three weeks, winding up proceedings will be initiated. The respondent sent a reply on 15-6-2010 pointing out that a sum of ₹5 lacs paid by it was not given credit and also pointing out that no details

of the sale of shares were given in the notice. The petitioner thereupon sent a letter dated 6-7-2010 in which it agreed that the payment of ₹5 lacs had not been given credit and reduced the outstanding to ₹4,88,17,156. The petitioner however denied that the sale of shares was not made known to the respondent. It was reiterated that the shares were sold only after serving a notice dated 17-3-2010 on the respondent.

8. The respondent not having paid the amount to the petitioner despite the statutory notice, the petitioner has filed the present petition u/s. 433(e), 434 and 439 of the Act. It may be added that on 17-3-2010 the petitioner had filed Comp. Pet. No.216/2010 in this court, which was withdrawn since it had not taken note of the amount of ₹1,70,02,832 realised by selling the pledged shares.

9. The contentions put forward on behalf of the petitioner are that the respondent is unable to repay the loan, that despite the sale of the pledged shares there is still a substantial amount of loan outstanding, that the respondent has neglected to repay the debt and in these circumstances the conditions of clause (e) of section 433 r.w. section

434(1)(a) of the Act are satisfied and the petition has to be admitted and winding-up proceedings be ordered.

10. The contention advanced on behalf of the respondent-company is that there was no doubt a default in repaying the debt by 30-6-2009, but after the first notice issued on 27-7-2009 the petitioner had transferred all the pledged shares to its DEMAT account in August and September 2009, that after the transfer the shares ceased to continue as collateral security for the loan, that once the shares were transferred in its name it is the date of transfer that shall be considered as the date of sale as is evident from the petitioner's conduct of seeking a nominee in the board of the respondent-company, that it is the market value of the shares as on the dates of the transfer to the petitioner's DEMAT account that has to be determined for the purpose of finding out whether the loan has been repaid or not, that the market value has to be arrived at on the basis of what a buyer of a controlling interest would pay as the promoters held 17.28% stakes in the respondent-company which would amount to a value in excess of ₹10 crores and thus there are substantial issues which have to be determined, particularly with reference to Section 176 of the Indian Contract Act, 1872 which deals

with the pledgor's and pledgee's rights and duties which rule out the applicability of section 433. It is submitted that the petitioner deliberately delayed the sale of the shares till March-May, 2010 by which time the market value had fallen and the loss caused on account of the delay is attributable only to the petitioner. It is pointed out that the respondent has filed a Civil Suit (OS) No. 3116/2011 in this court against the petitioner in which these issues have been raised and has prayed for recovery of ₹2.5 crores from the petitioner on the basis of the market value of the shares on the dates on which they were got transferred to the DEMAT account of the petitioner.

11. These arguments of the respondent are sought to be countered on behalf of the petitioner. It is pointed out that the defence based on section 176 of the Contract Act is an after-thought and no such defence was taken at any point of time during the prolonged exchange of correspondence between the parties and that it is taken for the first time in the reply filed before this court in answer to the present petition, which shows the lack of bona fide on the part of the respondent. It is further pointed out that the suit was filed almost 15 months after the petition for winding-up was filed and though the respondent has

referred to a sum of ₹5 crores as being recoverable from the petitioner, the relief claimed in the suit is limited to ₹2.5 crores obviously to save court-fee. It is clarified that the petitioner did not intend to acquire any controlling interest in the company and what was sought was only a say in the affairs of the respondent-company to protect its interests as a creditor. Several authorities were cited in support of these arguments.

12. It is well settled that a company will not be ordered to be wound-up if its defence to the petition is substantial. In ***Madhusudan Gordhandas and Co. v Madhu Woollen Industries Pvt. Ltd.*** (1972) 42 Comp. Cas. 125, the Supreme Court laid down that if the debt is bona fide disputed and the defence is substantial the court will not wind up the company. The defence however shall be taken in good faith and one of substance and should be likely to succeed in point of law; the company shall also adduce prima facie proof of the facts on which the defence rests. In ***Mediquip Systems (P) Ltd. v Proxima Medical System GmbH*** (2005) 7 SCC 42, the court held that if the defence was not mere moonshine the company will not be wound up. In ***IBA Health (India) Private Limited v Info-drive Systems Sdn. Bhd.*** (2010) 10 SCC 553 the Supreme Court held that if the debt is bona fide disputed, there

cannot be any “neglect to pay” within the meaning of section 434(1)(a) of the Act.

13. The question for consideration is whether on the facts and circumstances of the present case, the defence raised by the respondent is substantial.

14. That takes me to a consideration of section 176 of the Contract Act, 1872. As held by a Division Bench of the Bombay High Court in *Official Assignee vs. Madholal Sindhu* [AIR (34) 1947 Bom 217], followed by Lahoti, J., as he then was, of this Court in *Nabha Investment Pvt. Ltd. vs. Harmishan Dass Lukhmi Dass* 58 (1995) DLT 285, the provisions of this section are mandatory and cannot be over-ridden by any contract to the contrary. The section deals with the pledgee’s right where the pledgor makes default. If the pledgor-borrower makes a default in the repayment of the debt at the stipulated time, two courses are open to the pledgee-lender: (a) he may either bring a suit on the original debt or promise in which case he has the right to retain the pledged goods as collateral security or (b) he may sell the pledged goods on giving the pledgor reasonable notice of the sale. If the proceeds of the sale are less than the amount of the debt, the

pledgor is still liable to pay the balance of the debt; if the proceeds of the sale exceed the debt outstanding, the excess shall be paid over to the pledger-lender. It has been held that under this section, the pledgor cannot compel the pledgee to sell the goods pledged at a particular point of time, but if the pledgee exercises the power of sale, the pledgor has the right to insist that the sale should be honestly and properly made and the sale proceeds be applied to the debt. In case the sale is improperly exercised, the pledgee is liable to pay damages caused thereby to the pledgor. These rules were noticed by a Division Bench of the Madras High Court (Coutts-Trotter, C.J., and Pandalai,J.) in *SL. Ramaswamy Chetty v. M.S.A.PL. Palaniappa Chettiar* (AIR 1930 Mad. 364). In this case, it was also held that the power to effect sale included the power to purchase the goods if they are sold through court. The pledgee cannot sell to himself directly which will be without the authority of law. The consequence of such an act by the pledgee has been held by the Privy Council to be that though the pledgor does not get the right to have the goods back without repayment of the debt (*Naikram Dubey v Bank of Bengal* (1891) 19 IA 69), but he can claim

damages if the goods were sold below the market price (*Dhani Ram & Sons v Frontier Bank Ltd.* (AIR 1962 Punj. 321)).

15. Keeping these basic rules in mind, I may examine the facts before me. There is nothing on record to show that before transferring the shares to its DEMAT account, the petitioner gave reasonable notice to the respondent of its intention to do so. The notice dated 27-7-2009 speaks only of the general right of the petitioner to sell the shares and apply the sale proceeds in the discharge of the loan without specifically stating that the petitioner proposes to have the shares transferred to its own DEMAT account. There is no specific averment to this effect in the notice dated 27.7.2009 or in the petition. Thus, a mandatory requirement of the section has not been satisfied. In the first place, it is doubtful whether the petitioner had the right under the contract or under law to transfer the pledged shares to itself. Article-2 of the loan agreement dated 27-8-2008 deals with “security& margin”. Clause (iii) of Art. 2.1 provides as follows:

“Lender shall be entitled to sell, assign or transfer Lender’s rights and obligations under the agreement to any person (s) of Lender’s choice in whole or in part and in such manner and or such terms as Lender may decide. Any such sale, assignment or transfer shall conclusively bind the

Borrower. The Borrower shall not be entitled to directly or indirectly assign the benefit or obligation of this agreement.”

This clause is found repeated in all the subsequent loan agreements executed when extension or roll-over was granted. The clause, strictly interpreted, does not permit the transfer of the shares in the name of the lender (petitioner). It can only be transferred/sold in the name of a person of the lender's choice. Under this clause, the petitioner did not have the right to transfer the shares in its own name. Secondly, as earlier stated, no notice was given to the respondent of the petitioner's intention to get the shares transferred to the petitioner's DEMAT account. Thus, either way, there is difficulty in the petitioner explaining the transfer of the shares in its name.

16. That the petitioner got the shares transferred in its name cannot be disputed, for the reason that it was only on the basis that it was the owner of the 18,75,000 shares constituting a major chunk (17.28%) of the shareholding, that the petitioner wrote to the respondent-company on 27-10-2009 asking for explanation for the latter's failure to send notices of the AGM and also demanded the appointment of its nominee as a director. This letter and the conduct of the petitioner confirm the

fact that it became the owner of the shares in August-September, 2009. The consequence is that even if it is held, on the authority of the Privy Council and the Madras judgments (*supra*), that the sale to itself was not an unauthorised act on the part of the petitioner, still the petitioner has to answer why the value of the shares on those dates (August-September, 2009) cannot be taken into account for the purpose of reducing the indebtedness of the respondent. Even the Madras judgment (*supra*) says that any loss caused to the pledgor by an unauthorised act of the pledgee shall be made good by the pledgee. The view is supported by the judgment of the Punjab High Court in the judgment cited *supra*.

17. That takes me to the other part of the defence: the value of the shares. S.No. 6 of the Schedule 1 to the agreement dated 27-8-2008 provides that the value of the shares to be pledged shall be 2.5 times the amount of the loan and that the “*Value date would be closing share price on BSE as on date of pledge*”. The position cannot be different if it comes to ascertaining the value of the shares on the dates on which they were transferred to the DEMAT account of the petitioner. As per

the table set out earlier, the market value on those dates was ₹2,65,83,750.

18. Thus far there is no difficulty, though the petitioner would contend that it was right in giving credit only to the amount of the actual sale proceeds when the shares were sold for consideration in March-May, 2010. In the light of the authorities cited above, this contention cannot be countenanced. The petitioner cannot take contradictory positions by saying at one breath that it was the owner of a major chunk of shares and hence would want its nominee in the board of the respondent-company and at the same breath contest the plea that the value of the shares as on the dates of the transfer to its DEMAT account should be considered.

19. The respondent, however, goes so far as to contend that since 17.28% of the shares in its company amount to a controlling interest, the value as per the BSE index on the dates of transfer to the DEMAT account of the petitioner cannot be considered to be the true value, but due weight must be attached to the possibility of a buyer willing to purchase a controlling interest, in which case he would be paying much more than the market price. Such price is stated to be the average price

of the shares over the preceding 52 weeks, and the claim is that such value was ₹53.85 ps per share; it is submitted that in addition, there are different methods of estimating such price including the future business profits, profitability etc. It is contended that the prevailing market price on the date of transfer can never be the sole criterion for determining the market value of the promoters' stake. Applying even the average price of ₹53.85 per share, the total value comes to ₹10.10 crores on 2-9-2009 (when the petitioner got all the shares transferred to its DEMAT account).

20. It is a matter of speculation whether the petitioner desired to control the affairs of the respondent-company. The facts that it transferred the shares to itself, asked for the respondent's explanation for the lapse in issuing notices and further demanded a position for its nominee in the latter's board, prima facie appear to be consistent with the intention to gain control of the respondent-company. Further, there is no plausible explanation for holding on to the shares until March-May, 2010, by which time their value had fallen further.

21. These are substantial issues which the petitioner has to answer. These defences do not amount to mere moonshine, nor do they lack in

bona fide. They raise legal issues. This court cannot examine the relative merits and demerits of the claim and hold a trial, but I am of the view that prima facie they appear to merit consideration. They satisfy the tests propounded in the three judgments of the Supreme Court (supra). They cannot at any rate be dismissed as being without any substance.

22. Relying on *M/s Goodwill India Ltd v. M/s Paper Mills Pvt Ltd* (AIR 1996 P & H 60), it was contended by the petitioner that these defences were not taken at any earlier point of time, and were taken for the first time in the reply to the present petition and therefore cannot be looked into. A close look at the facts of the cited case shows that in that case the respondent-company which was sought to be wound-up took the plea for the first time in the written statement that the transaction with the petitioner was in fact a loan transaction couched in language suggesting that it was a lease. The basic character of the transaction itself was sought to be altered for the first time before the company court in the written-statement. That was not permitted, in the absence of any earlier plea to that effect. The facts of the present case are different, in the sense that the respondent does not seek to put forth

any drastic plea for the first time before this court which would change the very nature of the transaction between it and the petitioner. It does not dispute the fact that the transaction was a loan transaction; what is sought to be contested is only on the basis of section 176 of the Contract Act. In other words, without seeking to change the factual basis or the nature of the transaction, certain legal pleas based on the relationship between a pledgor and a pledgee are sought to be taken in the reply. No prejudice has been shown to have been caused to the petitioner by the fact that the respondent has raised such pleas before this court for the first time. It is only a technical objection by the petitioner in which I am afraid I see no merit.

23. I will now deal with the other judgments cited on behalf of the petitioner. A judgment of a learned single judge (*Thiruvengkatachariar, J.*) in ***Kesarimal v Gundabathula Suryanarayanamurthy and Anr.*** (*AIR 1928 Madras 1022*) was cited. I am unable to see any relevance of the judgment to the present case. It does explain the provisions of section 176 of the Contract Act but the later judgment of the Madras High Court, which has already been referred to supra, is that of a Division Bench and it does not say anything different from what has

been stated in the judgment of the learned single judge, vis-a-vis the provisions of section 176 of the Contract Act. The cited judgment lays down that it is not open to the pledgor to stipulate when the pledgee shall sell the pledged goods, if no time is stipulated for the sale in the agreement. It is the duty of the pledgee to give reasonable notice of the sale, but once notice has been given, the exact time at which the goods would be sold is not a matter on which the pledgor has any say. These are well-settled principles, and the cited judgment does no more than expound them.

24. *Geeta Prints Ltd. v Falcon Industries* (2009) 148 Comp Cas 146 is a judgment of the Gujarat High Court (Division Bench) and my attention was drawn to the observations at page 151 of the report. There, admittedly, the respondent-company did not reply to the statutory notice sent by the lender-company. The question was whether it gave rise to the statutory presumption. That question is entirely different. The judgment also discusses the scope of section 434(1)(a) of the Act, as to when a company shall be deemed to be unable to pay its debts. That question does not arise here. For the same reasons, the judgment of a Division Bench of this Court in *Joti Prasad Bala*

Prasad v A.C.T. Developers (P) Ltd. (1990) Comp. Cas. 601 also does not seem to be of any relevance. There, the single judge dismissed the petition for winding-up though he found that the defence set up and the counter-claim lacked in bona fide. The Division Bench set aside the judgment of the single judge holding that it showed an inconsistent approach.

25. The last judgment cited was that of the Supreme Court in *Lallan Prasad v. Rahmat Ali (AIR 1967 SC 1322)*. In paragraph 17 the legal position with reference to the rights of a pledgor and pledgee have been summed up in the light of the relevant provisions of the Contract Act. It has been highlighted that where the pawnor repays the debt he is entitled to the return of the pawned goods; the pawnee cannot be permitted to get repayment of the debt as also retain the pawned goods and thus gain an unjust double advantage. There is nothing in this paragraph which would militate against the issue sought to be raised by the respondent in the case before me.

26. For the above reasons, I am of the view that the defence taken by the respondent-company is substantial, has been taken in good faith and has prima facie merit deserving deeper examination; moreover,

there is prima facie proof of the facts on which the defence rests. It is now well settled that winding-up proceedings are not a means of recovering the debts due from a company. I accordingly dismiss the petition with no order as to costs.

(R.V. EASWAR)
JUDGE

July 30, 2013
Bisht