IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.340 OF 2013

Unicredit Bank Austria AG ….Petitioner
V/s.
M/s. Stationery Point India Limited ….Respondent

WITH
COMPANY PETITION NO.341 OF 2013

Unicredit Bank Austria AG ….Petitioner
V/s.
M/s. S.K. Agrotech Industries Limited ….Respondent

WITH
COMPANY PETITION NO.490 OF 2013

Landesban Baden-Wurttemberg ….Petitioner
V/s.
Pushkaraj Packaging India Pvt. Ltd. ….Respondent

WITH
COMPANY PETITION NO.491 OF 2013

Landesban Baden-Wurttemberg ….Petitioner
V/s.
Stationery Point India Limited ….Respondent

WITH
COMPANY PETITION NO.492 OF 2013

Landesban Baden-Wurttemberg ….Petitioner
V/s.
Shivani Flexipack Limited ….Respondent

Ms. Usha Srivastava i/b. M/s. Consulta Juris for the petitioner.

Mr. Simil Purohit a/w. Mr. Nilesh Parab i/b. Sachin V. Masurkar for the respondent.

CORAM : K.R.SHRIRAM,J
DATE : 7th December, 2015

P.C.:-

1 The company petition no.340 of 2013 is filed on the basis that the petitioner have a claim of Euro 447,798.50/- against the respondent which was payable under a letter of guarantee issued by the respondent on 2nd March, 2010. According to the petitioner the said amount is debt payable by the respondent company. As the respondent has failed and neglected to make the payment, it could be considered that they are unable to pay its admitted debts, hence it is just and equitable that the respondent company be wound up.

2 The petitioner states that the respondent is the parent company of M/s. S.K. Agrotech Industries Limited (SK Agrotech). SK Agrotech had approached Austrian exporter SML Maschinengesellschaft mbH, for purchase of Co-extrusion Calendering Line for Pet Sheet (Equipment) on 2nd December, 2009. The parties had agreed to define the payment schedule. The parties thereafter entered into an Amendment of Sales Contract on 9th March, 2010 and the goods were shipped by the exporter SML to SK Agrotech. SML thereafter forwarded their invoices dated 2nd December, 2010 for Euro 193,000/- and dated 7th December, 2010 for Euro 772,500/- towards payment for the goods supplied and received by SK Agrotech.

3 In terms of the said contract, SK Agrotech was to provide irrevocable guarantee of Euro 772,400/- (representing 80% of the value of the contract) plus contracted interest to secure the payment of 8 semi-annual installments under the said contract. At the request of the SK Agrotech, the respondent being the parent company of SK Agrotech, issued an Irrevocable Letter of Guarantee irrevocably and unconditionally undertaking to pay any amount arising under the contract executed between SK Agrotech and Austrian exporter SML. The Letter of Guarantee also provided that SML may assign the whole or any part of their rights under this guarantee without the consent of the respondent to the petitioner among others mentioned therein. In view of the liberty granted under the Letter of Guarantee, SML assigned its claims under the invoices to the petitioner. The petitioner also notified SK Agrotech and also respondent. As the respondent did not pay the first installment, by a letter dated 23rd December, 2011 the petitioner called upon the respondent to make the payment. This was followed by another letter dated 25th June, 2012. As the respondent still did not make the payment, the petitioner through their advocate issued a statutory notice under section 433 (e) read with 434 of the Companies Act, 1956. This statutory notice has been returned with the endorsement “closed”.

4 Though the respondent have raised issue on this statutory notice, their primary defense is that the equipments/machineries supplied by SML did not function satisfactorily and the entire project for which SK Agrotech had imported the machinery did not take off. According to the respondent, SK Agrotech, the promoters of SK Agrotech/respondent had invested Rs.19.43/- crores out of the project cost of Rs.52.60/- crores. For the balance, the respondent had also sought finance from State Bank of India in the sum of Rs.20 crores. The State Bank of India had also granted working capital limit of Rs.10 crores. According to the respondent the PET Extrusion Line Machine supplied by SML was the basic machine to start the entire process for which the project was started and as the machine itself did not function, the respondent suffered huge losses and in any case are not liable to pay. To the affidavit in reply, the respondent has annexed various correspondence exchanged between the parties highlighting that one Motan Dryer -Motan Material Dosing Unit which was essential and integral part for the function and maintenance of the Co-extrusion cast film line delivered by SML was not functioning properly. It is not a new defense that the respondent has taken up after the petition was filed.

5 It is true that no reply has been filed by the respondent to the statutory notice but it is the respondent's case that the statutory notice itself was not delivered. The counsel for the petitioner submitted that the petitioner's all other correspondence have been received at the same address but it is a matter of mystery how the statutory notice could not be delivered. The counsel for the petitioner also pointed out that the endorsement on the envelope which stated “closed” is dated 13th August, 2012 and that was a Monday.

6 Be that as it may, the issue herein is whether the respondent has a bonafide defense. It is settled law that where parties raised a bonafide defense or a substantial dispute a company should not be wound up. In ***IBA Health (India) Private Limited vs. Info-Drive Systems Sdn. Bhd.,***[1] paragraph 20 to 23 reads as under :-

> “20. The principles laid down in the above mentioned cases indicate that if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to 14 pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

1. (2010) 10 SCC 553

COMMERCIALLY SOLVENT

21. Appellant company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434 (1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay it debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.

22. An examination of the company's solvency may be a useful aid in determining whether the refusal to pay debt is a result of a bona fide dispute as to the liability or whether it reflects an inability to pay. Of course, if there is no dispute as to the company's liability, it is difficult to hold that the company should be able to pay the debt merely by proving that it is able to pay the debts. If the debt is an 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 can be seen as relevant as to whether there was a dispute as to the debt, not as a ground in itself, that means it cannot be characterized as a stand alone ground.

23. We have gone through various terms and conditions of the deed of settlement as also the compromise agreement and the allegations raised in the company

petition and the objections filed by the appellant company. Both the parties are in agreement that they are bound by the terms and conditions of the deed of settlement. The respondent maintained the stand that substantial payments have been released by M/s Solutions Protocol Sdn. Bhd. in respect of various invoices raised by the appellant on or before 31.12.2006, this is the cut off date mentioned in the deed of settlement. The appellant company categorically denied that it had received payments on or before 31.12.2006, except the amount already received from M/s Solutions Protocol Sdn. Bhd. had been paid over to the respondent. Clause (2) of the deed of settlement states that the parties had agreed that the settlement sum was formulated based on the following proportions of the total amounts of MEDICOM produce license fee and/or all other payments received by MEDICOM from SP and/or SP/JV by virtue of the HICT Package I Contract. Further, it is stated therein that the settlement sum shall be valid for payments received by MEDICOM from SP and/or SP/JV under the HICT Package I Contract and/or the HIS Software applications modules contracted for the HICT Package I Contract with SP/JV only and it was conclusively agreed to that BITECH shall not in any circumstances whatsoever be entitled in law or otherwise for any payment for any other contracts including contracts involving MEDICOM and Solutions Protocol from the Government of Malaysia or otherwise, whether in Malaysia or any other country. Further, Clause (4) also stipulated that the parties have acknowledged that the obligation of MEDICOM to pay BITECH the settlement sum shall always be subject to MEDICOM (or its representatives or nominees) having received payments of sufficient value from SP and/or SP/JV to enable the payment of upto the maximum amount of the settlement sum to be made on or before 31.12.2006, which is the Cut-off date. Further, it is seen that one of the terms of the compromise was that the respondent would make reasonable efforts to persuade M/s. Solutions Protocol to settle the invoices of the appellant at the earliest."

7 I am satisfied from the exchange of correspondence, copies whereby filed alongwith various affidavits that the dispute raised by the respondent was substantial and genuine and not spurious, speculative or misconceived. The company court cannot hold a full trial of the matter. The company court has to only see whether the ground appeared to be substantial. In my view, the ground of dispute raised is rather substantial.

8 In the circumstances, the company petition no.340 of 2013 is dismissed.

(K.R.SHRIRAM,J)