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

COMPANY PETITION NO.244 OF 2012

Asset Reconstruction Company (India) Limited, a Company incorporated under the Companies Act, 1956 registered as a Securitisation Company and an Asset Reconstruction Company pursuant to Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and a Financial Institution under Section 2(h)(ia) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and having its Registered Office at The Ruby, 10th Floor, 29 Senapati Bapat Marg, Tulsi Pipe Road, Dadar (West), Mumbai-400 028 .. Petitioner

V e r s u s

Sunearth Ceramics Ltd a company incorporated under the provisions of Companies Act, 1956 having its Registered Office at 201, New Bharat Building, Ghorupdeo Cross Lane No.1, Off. Rambhau Bhogle Marg, Byculla (East), Mumbai-400 033 .. Respondent

WITH
COMPANY APPLICATION NO.290 OF 2014

M/s Sunearth Ceramics Limited .. Applicant

V e r s u s

Asset Reconstruction Company (India) Ltd .. Respondent

WITH
COMPANY APPLICATION NO.202 OF 2014

Asset Reconstruction Company (India) Ltd .. Applicant

V e r s u s

M/s Sunearth Ceramics Limited .. Respondent

Mr. Shyam Mehta, Senior Counsel with Mr. Faisal Sayyed and Mr. Rajendra J. Shinde i/b Manilal Kher & Ambalal & Co., for the Petitioner in Company Petition No.244 of 2012.

Mr. Gautam Ankhad ib/ Mr. Jamshed Ansari for Respondent a/w Ex-Director-Mr. Suresh Motwani.

CORAM : K.R. SHRIRAM, J.

DATE : 11 FEBRUARY 2016.

JUDGMENT :

1 The Petitioner is an Assignee of the Financial Assets and Security Interest in respect of the Respondent-company made by The South Indian Bank Ltd. As on the date when the statutory notice was issued, the Petitioner claimed an amount of Rs.75,92,47,506/- including interest as on 31 January 2012.

2 According to the Petitioner, which is not disputed by the Company, pursuant to the deed of assignment dated 18 March 2005, The

South Indian Bank Ltd., unconditionally and irrevocably assigned, transferred and released in favour of the Petitioner in their capacity as Arcil-CPS 008-I Trust all the financial assistance extended to the Company together with all underlying security interest and The South Indian Bank's right, title and interest thereto. That is, how this petition has been filed by the Petitioner.

3 On or about 15 September 1998, The South Indian Bank Ltd sanctioned credit facilities in favour of the Company which was enhanced from time to time upto an amount of Rs.18,60,00,000/-. In respect of the credit facilities, the Company executed Instruments of Hypothecation of Book Debts dated 26 October 1998, 6 December 1999, 6 March 2000 and executed various Agreements of Loan and other documentation relating to the cash credit and other non-fund based limits aggregating to Rs.14,00,00,000/- in favour of The South Indian Bank Ltd. On 16 March 2001, the Company executed equitable mortgage by deposit of title deed with The South Indian Bank Ltd in respect of the immovable properties situated at Alibag, Aurangabad and Karjat. On 26 July 2001 and 26 March 2002, the Deeds of Hypothecation of movables were executed by the Company in favour of The South Indian Bank Ltd.

4 As the Company was not paying back the amount lent by The

South Indian Bank Ltd., in January 2004, The South Indian Bank Ltd filed Original Application No.19 of 2004 against the Company before the Debt Recovery Tribunal claiming the amount of Rs.18,99,52,327.16. I am told this Original Application is still pending.

5 on 18 March 2005, the Deed of Assignment was executed by The South Indian Bank in favour of the Petitioner. As mentioned earlier, apart from the financial assets and security interest of the South Indian Bank, the Petitioner also acquired the financial assets and security interest of other banks in the Company which represented 55% of the debt of the Company. On 19 March 2012, the Petitioner issued a statutory notice through their advocate to the Company. The Company did not even reply to the said notice, despite admittedly, receiving the same. Therefore, the Plaintiff filed the present petition on 11 May, 2012.

6 It is case of the Petitioner that the Respondent has admitted the debt to the Company and the defence raised is nothing but frivolous and lacks bonafide.

7 Before we consider what the learned Counsel for the Company submitted, it is necessary to note that in the year 2003, the Company filed a Reference to the Board For Industrial and Financial

Reconstruction (BIFR) being a Reference No.21 of 2003. This Reference came to be dismissed on 7 September 2009, against which the Company preferred an Appeal. On 13 July 2005, the Appellate Authority for Industrial & Financial Reconstruction (AAIFR) remanded the matter back to the BIFR for reconsideration. On 9 May 2007, the BIFR once again dismissed the Reference, which was sent to it for reconsideration. Against that order, the Company again filed an Appeal before the AAIFR and that appeal came to be dismissed on 15 March 2010.

8 Interestingly, the Company filed a fresh Reference being Reference No.22 of 2010 to the BIFR on 23 April 2010. This reference was filed on the basis of Balance Sheet of the Company for the period 31 March 2004 to 31 March 2009. On 22 July 2010, the BIFR dismissed this Reference No.22 of 2010, against which the Company filed an Appeal being Appeal No.2033 of 2010 before the AAIFR.

9 On 1 March 2010, this Court was pleased to pass an order regarding a finding that the Company was only wasting the time in the matter and the same was causing great prejudice to the creditors of the Company, who have been waiting for their payments since for about 10 years and directed the AAIFR to dispose of the Appeal, on 28 March 2012, the date on which, the matter was scheduled to be listed before the

AAIFR.

10 On 3 April 2012, an order of the AAIFR dismissing the Appeal No.233 of 2010 was passed and the AAIFR held that the Reference by the Company was not maintainable. While dismissing the appeal, the AAIFR issued a clarification that :

> "The Company will be at liberty to file a fresh Reference on the basis of a modified ABS pertaining to the single industrial unit in case it fulfills the eligibility condition u/s 3(1)(o) of SICA."

11 This reference to Single Industrial Unit was a reference to the factory unit of the Company situated at Sindhudurg which was lying closed in respect of which no action was taken under the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ("the SARFAESI Act")

12 On 6 April 2012, the Company filed third reference before BIFR on the basis of Audited Balance Sheets covering all the units of the Company and not just the Sindhudurg Unit. On 17 May 2012, the Registrar of the BIFR refused to register the Reference, against which, on 5 June 2012, the Company filed an appeal before the Secretary under

Regulation 19(8)(1) of the BIFR Regulations 1987.

13 On 13 February 2013, this Court passed an order directing the Company to file an Affidavit placing on record the details regarding the proceedings before the Authorities under SICA alongwith copies of the Applications/Appeals and Orders passed therein. The Company filed an Affidavit on 20 February 2013.

14 On 3 September 2013, the Court passed an order, interalia, directing the Company not to take any further steps in the proceedings before BIFR/AAIFR and recorded the statement of the Company that it will not proceed with the mater pending before BIFR/AAIFR.

15 As the AAIFR issued notice of hearing on 15 January 2014 to Mr. Vinod Gurbux Motwani, Director of the Company informing him about the appeal filed before the Secretary-BIFR, this Court by by an order dated 10 February 2012, directed the Company to inform the Secretary, BIFR not to pronounce the final order in the matter.

16 BIFR proceedings rests there, which will in effect mean, there is no inquiry pending before BIFR which may warrant suspension of claims under Clause 22(1) of SICA.

17 On 27 June 2014, this petition was by consent, admitted and advertised. Advocate Mr Shailesh Kalambi was appointed as Authorised person to conduct the sale of the assets of the company including the Bharuch unit. Shri Shailesh Kalambi has filed the report stating that despite public notices for sale of assets of the Company, he has not been able to sell any of the assets. By an order dated 3 February 2016, Shri Shailesh Kalambi has been discharged.

18 Going through the defence raised by Shri Gautam Ankhad, the learned Counsel on behalf of the Company, Shri Ankhad candidly admitted that the amounts are payable to the Petitioner, though there were some disputes on the quantum. Shri Ankhad also submitted that the Company repeatedly approaching BIFR, should not be construed as malafide act of the Company as the Company did feel that there was good prospects for the Company upon restructuring. Shri Ankhad, the learned Counsel also submitted that bonafide of the Directors of the Company could be seen from the fact that 52 petitions/suits against the Company were filed, of which 41 have been settled. Therefore, the Company had an intention to pay all the creditors as much as possible and that is why they even agreed for admission of the petition by the Company and sale of the assets, so that the creditors are paid.

19 The Apex Court in case of IBA Health (India) Private Limited Vs. Info-Drive Systems SDN. BHD., (2010) 10 Supreme Court Cases 553 in Paragraphs-20 to 25,30 & 31 has analysed the provisions of Companies Act, 1956 relating to winding up of the Company. It will be useful to reproduce those paragraphs.

> ***Substantial dispute-As to liability***
> *20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bonafide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must be decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bonafide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bonafide disputed debt.*
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> *21. In this connection, reference may be made to the judgment of this Court in Amalgamated Commercial Traders (P) Ltd V. A.C.K. Krishnaswami in which this Court held that : (Comp Cas p.463)*
> *"It is well settled that 'a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bonafide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court.....' "*
>
> *22. The above mentioned decision was latter followed*

by this Court in Madhusudan Gordhandas and Co. V. Madhu Woollen Industries (P) Ltd. The principles laid down in the above mentioned judgment have again been reiterated by this Court in Mediquip Systems (P) Ltd V. Proxima Medical System GmbH, wherein this Court held that the defence raised by the appellant Company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. The abovementioned judgments were later followed by this Court in Vijay Industries Vs. NATL Technologies Ltd.

23. The principles laid down in the abovementioned 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 its debts is not substantiated and non-payment of the amount of such a bonafide 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.

Commercially solvent

24. The 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.

25. 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 whether 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 owning, 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 is 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 characterised as a stand alone ground.

30. A company petition cannot be pursued in respect of contingent debt unless the contingency has happened and it has become actually due. In the absence of any evidence, it is not possible to conclude that M/s Solutions Protocol Sdn. Bhd. had in fact paid any amount to the appellant Company towards commission charges due to the respondent Company before cut-off date. A legal notice prior to the institution of the company petition could be served on the company only in respect of the debt (then due) and a company could be wound up only if it was unable to pay its debts. In this case, there is a bonafide dispute as to whether the amount claimed is presently due and if, at all, it is due, whether the appellant Company is liable to pay the sum unless they have received the same from M/s Soclutions Protocol Sdn. Bhd.

31. Where the company has a bonafide dispute,the petitioner cannot be regarded as a creditor of the company for the purposes of winding up. "Bona fide dispute" implies the existence of a substantial ground for the dispute raised. Where the Company Court is satisfied that a debt upon which a petition is founded is a hotly contested debt and also doubtful, the Company Court should not entertain such a petition. The Company Court is expected to go into the causes of refusal by the company to pay before coming to that conclusion. The Company Court is expected to ascertain that the company's refusal is supported by a reasonable cause or a bonafide dispute in which the dispute can only be adjudicated by a trial in a civil court.

20 The following points convince me that the Company has

become commercially insolvent and requires to be wound up.

(a) Not once, but thrice the Company has filed Reference u/s 15 of SICA and the Company has admitted it was a sick industrial unit. A Company shall make Reference to BIFR only when it became a sick industrial unit. Section 3(1)(o) of SICA defines sick industrial company, as an industrial company, which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.

(b) Beginning 2003, till date, the Company is crying hoarse that it has become a sick Industrial Company, because its accumulated losses have exceeded its entire net worth. In the Balance Sheet for the year ending 31 March 2013, in the Auditors' Report, in clause-4, it is stated that the accumulated losses of the Company have exceeded the entire net worth of the Company by Rs.299.70 Crores. It is mentioned that the accounts have have been prepared by the management on a going concern basis. Due to certain uncertainty, even the Auditors are unable to opine as to how the Company can operate as going concern. In the Annexure to the Auditors' report in clause (xiv), it is mentioned that the Company is sick industrial company within the meaning of clause (o) of sub-section (1) of Section 3 of Sick Industrial Company.

(c) The Balance Sheet filed with the Auditors' Report for the year ending on 31 March 2013, the losses are shown as Rs.338.34 Crores. The Petitioner is shown as secured creditor to whom the Company was indebted in excess of Rs.280 Crores. This amount does not include interest because banks / financial institutions have not charged the interest on their respective loan amounts as they have classified the advances given to the Company as NPA accounts.

(d) Admittedly, the Company has also, not been filing its Annual Reports with the Registrar of Companies since the year 2010.

21 In the circumstances, it is obvious that the substratum of the Company is lost. I repeatedly asked Shri Ankhad, the learned Counsel as to what is the proposal with them for revival of the Company and to pay the Creditors. Shri Ankhad could not give answer, because the Company did not have any scheme in place as to how they are going to pay the Creditors. In fact, he even sought instructions from the Ex-Director of the Company Mr. Suresh Motwani who is present in the Court and he also did not have any answer.

22 Pursuant to the order of admission, the Petitioner has advertised the petition in two local newspaper i.e. Free Press Journal (in English) and Nav-Shakti (in Marathi) and Government Gazette. The

affidavit of service proving the same is also on record. The notice under Rule 28 of the Companies (Court) Rules, 1959 has been waived by the Company.

23 In the circumstances, in my view, the Company is enable to pay its debts, it is commercially insolvent, and deserves to be wound up. The Company Petition is, therefore, allowed in terms of prayer clauses-(a) and (c), which are reproduced herein under :

> "(a) that the Respondent Company viz. Sunearth Ceramics Ltd, be ordered and directed to be wound up by and under the orders and directions of this Hon'ble Court;
>
> (c) that the Official Liquidator, High Court, Bombay or some other fit and proper person be appointed as the Liquidator of the Respondent Company i.e. Sunearth Ceramics Ltd, with all powers under the Companies Act, 1956. "

24. The Official Liquidator shall forthwith act on the authenticated copy of this order without awaiting for any Notification.

25 Company Petition is accordingly disposed.

26 All pending Company Applications accordingly disposed.

27 At this stage, Shri Ankhad, the learned Counsel seeks for stay of this order for four weeks. Normally, in such cases the Courts would not have refused stay. Undisputedly, the Company has suffered humongous losses. The accumulated loss as compared to its net worth is touching Rs.300 Crores. Company's net dues to ARCIL alone is over Rs.250 Crores in principal amount not mentioning the interest. The Company has been dragging on this matter for many years and has filed three References before BIFR. In the circumstances, I do not see any reason as to why any stay should be granted. The prayer for stay is rejected.

(K.R. SHRIRAM, J.)