

CP.No.305 of 2014

RAJIV SHAKDHER,J.

1. It is not disputed before me by Mr.Kuberan, the learned counsel for the petitioner, that on the same set of facts, a summary suit was instituted in the High Court of Bombay.

1.1. It is also not disputed by the learned counsel that the learned Single Judge of the High Court of Bombay, had granted conditional leave to the respondent company, to defend the suit.

2. I am told that the condition imposed was that the respondent company was asked to deposit the entire suit amount, i.e., 1,24,33,346/-.

2.1. The time frame given by the learned Single Judge, was 12 weeks.

2.2. This order was passed by the learned Single Judge, on 25.02.2015.

3. The petitioner, being aggrieved by the aforementioned order, carried the matter, in appeal, to the Division Bench of the High Court of Bombay.

3.1. This appeal was registered as: Appeal No.385 of 2015.

3.2. The Appellate Bench disposed of the appeal with the following operative directions:

“.. .. The learned counsel for the appellant states under the instructions of Mr.L.Raja (Deputy Manager/Procurement) and Mr.G.Dineshkumar (Legal Consultant) of the appellant, who are present in the Court that the appellant will deposit a sum of Rs.50 lakhs with the Prothonotary and Senior Master of this Court by 25 September 2015.

2. Upon deposit of the amount the respondent-plaintiff will be at liberty to withdraw the said amount. The learned counsel for the appellant further states that after withdrawal of the amount if the respondent-plaintiff supplies the appropriate test certificates corresponding to invoices in question, the appellant will deposit the balance principal amount as per the impugned order of the learned Single Judge within three months after the respondent-plaintiff supplies the test certificates to the appellant.

3. To enable the respondent-plaintiff to accede to above request of the test certificates, the appellant shall furnish all necessary particulars to the respondent-plaintiff by 31 August 2015.

4. The order of the learned Single Judge stands modified in the above terms and the appeal is, accordingly, disposed of in the above terms...".

4. Counsel for the respondent company informs me that a sum of Rs.50,00,000/- (Rupees Fifty Lakhs only), as directed by the Division Bench of High Court of Bombay, has been deposited.

5. Similarly, Mr.Kuberan, who appears for the petitioner, says that a sum of Rs.50,00,000/-, which was deposited by the respondent company has been withdrawn.

6. Therefore, what remains to be done by the petitioner herein to enable deposit of the balance principal amount by the respondent company is to fulfil the conditions contained in the Division Bench's order, which is, to supply the appropriate test certificates corresponding to invoices, in question.

7. The respondent company has been given a time frame of three (3) months to deposit the principal amount, after the appropriate test certificates are supplied by the petitioner herein.

7.1. In this behalf, the respondent company has been directed to furnish all necessary particulars to the petitioner herein by 31.08.2015.

8. Counsel for the respondent company says that particulars have been furnished.

9. Therefore, the deposit of the balance principal amount is, now apparently, pivoted on the petitioner herein furnishing the relevant test certificates.

10. In these circumstances, it is clear that the petitioner herein is largely, secured, with regard to its monetary interest.

11. Furthermore, the fact that leave has been granted by the High Court of Bombay to the respondent company to defend the suit filed by the petitioner herein, is indicative of the fact that the issues raised by the respondent company require trial.

12. Mr. Kuberan says, that the mere fact that the suit has been instituted will not dis-entitle the petitioner herein from proceeding with the company petition.

13. This broad proposition enunciated by Mr.Kuberan cannot be quibbled with save and except that it requires to be viewed from the prism of facts obtaining in each case. Mr.Kuberan has not disputed before me that the claim made in the Suit and that which is made in the instant petition is identical.

13.1. The probable defence available to the respondent company has been examined by a Court of co-equal jurisdiction. The concerned Court has come to the conclusion that the Suit needs to be sent for trial though with caveat, which protects the monetary interest of the petitioner herein.

13.2. Admittedly, the petitioner herein has not carried the

order passed by the Division Bench in Appeal to the Supreme Court.

14. It is trite to say that jurisdiction available to this Court under Section 433 (3) of the Companies Act 1956, is a discretionary jurisdiction, which has to be exercised after, having regard to all circumstances obtaining in a matter.

15. Mr.Kuberan says that there are other petitions, as well, instituted against the respondent company, which would willy-nilly demonstrate that its financial position is weak.

15.1. This argument of Mr.Kuberan could have only been an ancillary submission, provided, I was otherwise convinced based on the facts of the instant case, that a winding up order needs to be passed.

15.2. In turbulent times, temporary financial set backs are

the order of the day. What requires to be seen is whether non-payment of an admitted debt is an act of deliberate obstructionism. That is, even when, the debtor company has the funds, it chooses not to pay its creditors.

16. This apart, a debtor company could also land itself in a situation, when, despite best intentions, it is unable to pay its creditors. In such situation, ordinarily the debt-equity ratio is completely skewed, net worth is eroded and the chances of resuscitating the Company are 'nil' - till such time debt is reorganised, and fresh funds are infused via a formal rehabilitation/restructuring plan/Scheme.

16.1. In such situations, a Company Court may have to take the hard decision of ordering winding up of a Company by putting it notice that unless it comes up with a viable rehabilitation plan, which adheres to the rigour of law, it would have to take necessary precipitative steps. The reason, why a

Court would be propelled to do so, is, to protect the interest of the existing and/or prospective creditors. Persons and entities dealing or proposing to deal with such a Company should know the state of its financial health.

16.2. Therefore, notwithstanding the fact that, there are, other Petitions filed; cannot, by itself, be the reason, to wind up the respondent Company, unless this Court comes to the conclusion that, it is clearly placed in a position, whereby it cannot pay its creditors at large. At the end of the day, one such petition would be sufficient. However, in the instant petition, I am unable to form such an opinion, given the fact the respondent Company has already deposited Rs.50.00 lakhs, to the credit of the Suit filed by the petitioner and, has undertaken to deposit the balance principal amount, on fulfilment of the conditions by the petitioner.

16.3. Therefore, to my mind, this petition ought not be continued any further, in view of the circumstances set out above.

16.4. Accordingly, the petition is dismissed.

17. Needless to say, any observation made hereinabove will not come in the way of the petitioner prosecuting its Suit instituted against the respondent company.

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29/09/2016

RAJIV SHAKDHER,J.

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